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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

The State of Ohio, Plaintiff, vs. The Chattanooga Boiler and Tank Company, a Tennessee Corporation, Chattanooga, Tennessee, Defendant.	}	No. 18 Orig^l Original At Law.

MOTION FOR LEAVE TO FILE PETITION, PETITION, AGREED STATEMENT OF FACTS.

By GILBERT BETTMAN,
Attorney General,
OSCAR A. BROWN,
Assistant Attorney General,
Counsel for Plaintiff.

ARNOLD, WRIGHT, PURPUS & HARLOR,
Counsel for Defendant.

FRANCIS J. WRIGHT,
Of Counsel.

TOOF, BAKER & RODENFELS, Law Printers, Columbus, Ohio.

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IN THE

Supreme Court of the United States

The State of Ohio, Plaintiff, vs. The Chattanooga Boiler and Tank Company, a Tennessee Corporation, Chattanooga, Tennessee, Defendant.	No. ..... Original At Law.

MOTION FOR LEAVE TO FILE PETITION.

Now comes the plaintiff, the State of Ohio, by its Attorney General Gilbert Bettman, and presents herewith its petition in the above entitled cause and respectfully moves this court for leave to file the same in this court under its original jurisdiction.

The State of Ohio,
By GILBERT BETTMAN,
Attorney General,
OSCAR A. BROWN,
Assistant Attorney General,
Counsel for Plaintiff.

NOTICE OF HEARING.

Please take notice that on the fourth day of January, 1932, or as soon thereafter as counsel can be heard, the motion of the plaintiff for leave to file its petition in the above entitled cause will be submitted to the Supreme Court of the United States.

The State of Ohio,
By GILBERT BETTMAN,
Attorney General,
OSCAR A. BROWN,
Assistant Attorney General,
Counsel for Plaintiff.

Service accepted this 21st day of December, 1931.
ARNOLD, WRIGHT, PURPUS & HARLOR,
Counsel for Defendant.

PROOF OF SERVICE.

We hereby acknowledge receipt of copy of motion for leave to file petition, notice of hearing, and brief, this twenty-first day of December, 1931.

ARNOLD, WRIGHT, PURPUS & HARLOR,
Counsel for Defendant.

BRIEF ON MOTION FOR LEAVE TO FILE PETITION.

As cause for this motion it is respectfully shown:

1. That this cause involves a controversy between the state of Ohio and a citizen of another state.

2. That the state of Ohio as party plaintiff, is the real party in interest.

3. That this cause is of a justiciable character, of a civil nature, and is instituted to enforce the recovery of property due to the state of Ohio.

4. That it is not a suit to enforce a penalty under the state law and the nature of the controversy does not call for a judgment on a political or governmental question.

5. That no service of process can be had within the state of Ohio upon the said defendant corporation or any of its officers or agents.

6. That the policy of the state of Tennessee, the residence of the defendant, regarding the subject matter in controversy, as enunciated by its statutes and by its Supreme Court, is in conflict with the rights of the state of Ohio involved in the present suit.

Wherefore, the plaintiff prays that this Honorable Court may exercise its original jurisdiction in this controversy as provided in the Judicial Code, Section 233 (28 U. S. C. A., 341).

The State of Ohio,
By GILBERT BETTMAN,
Attorney General,
OSCAR A. BROWN,
Assistant Attorney General,
Counsel for Plaintiff.

PETITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the state of Ohio, one of the United States of America, respectfully shows this Honorable Court that:

1. The state of Ohio is one of the United States of America and that this action is brought on its behalf pursuant to the written request made on the attorney general of Ohio by the Industrial Commission of Ohio, a duly constituted department of the state government, and that Gilbert Bettman is the duly elected, qualified and acting attorney general of the state of Ohio and that this action is brought under and by virtue of Article II, Section 35, of the Constitution of the state of Ohio and the Ohio workmen's compensation law, particularly Section 1465-74 of the General Code of Ohio. (See Appendix A.)

2. The plaintiff further shows that the defendant is a corporation organized and existing under the laws of the state of Tennessee and is a citizen thereof with its principal place of business located in the city of Chattanooga in the said state.

3. This action is brought in the Supreme Court of the United States in the exercise of the original jurisdiction of said court on the ground that it is an action at law relating to a controversy between a state and a citizen of another state of the United States.

4. Plaintiff further says that on or prior to the fifth day of May, 1928, William R. Tidwell, deceased, was in the employ of the defendant and that the defendant was engaged in the manufacture and construction of boilers and tanks in Chattanooga, Hamilton county, Tennessee, and in the erection and construction of boilers and tanks in various other states, including the state of Ohio; that the defendant had in its employ on and prior to the date aforesaid three (3) or more workmen or operatives regularly employed in its business; that on and prior to the aforesaid date the defendant was engaged in doing business in the state of Ohio and in the erection and installation of tanks in the city of Ironton, Lawrence county, Ohio; that on and prior to the aforesaid date the said defendant had in its employ three (3) or more workmen or operatives regularly employed in its business within the state of Ohio.

5. Plaintiff further says that the said defendant company had failed and neglected to comply with the workmen's compensation law of Ohio by becoming a subscriber to the state insurance fund or electing to pay compensation direct to the injured employes as provided in Section 22 of said act, the same being Section 1465-69 of the General Code of Ohio.

6. Plaintiff further says that on or about the fifth day of May, 1928, the deceased person, William R. Tidwell, was regularly in the employ of said defendant under a contract of hire as a rivet heater in connection with the erection and installation of certain tanks of said defendant company in Ironton, Lawrence county, Ohio; that the

deceased was engaged in erecting and installing one of the tanks in the said city of Ironton, Ohio, and while in the course and within the scope of said employment, fell from the top of the tank sustaining a fracture at the base of the skull and as a direct and proximate result of said injury, the said William R. Tidwell died on the following day, to wit, May 6, 1928.

7. Plaintiff further says that Mrs. Cora Tidwell, wife of the said deceased, did on the sixteenth day of October, 1928, file her application with the Industrial Commission of Ohio for compensation from the defendant herein on account of the injury received by her husband, William R. Tidwell, which caused his death as above set forth, in accordance with Section 27 of the workmen's compensation law of Ohio, the same being Section 1465-74 of the General Code of Ohio; that thereafter on or about the fourteenth day of June, 1929, said Industrial Commission of Ohio, after due and proper notice to the defendant, heard the application of said Mrs. Cora Tidwell and found and determined that the said Mrs. Cora Tidwell was wholly dependent on the deceased at the time of his death, and that said Mrs. Cora Tidwell was entitled to compensation for said injury and death of her husband, William R. Tidwell, in the sum of four thousand eight hundred dollars and sixty-four cents ($4800.64) for two hundred eight weeks (208) at the rate of twenty-three dollars and eight cents ($23.08) per week; also a sum of one hundred ten dollars ($110.00) medical and funeral expenses. (Agreed statement of facts, see Appendix B.)

8. The plaintiff says that by virtue of the facts here-

inbefore recited, and under and by virtue of the laws of the state of Ohio, hereinbefore referred to, and which are specially relied upon, the Industrial Commission of Ohio was duly empowered and authorized to make the said award, had all necessary authority and jurisdiction therefor, and that in said proceeding before the said commission, the defendant herein appeared and defended said proceedings before the said commission. Plaintiff further charges that the award as made by the said commission, and as recited hereinabove, was a proper and legal award under the facts and pursuant to the said statutes of the state of Ohio, in which state the said William R. Tidwell was injured and died while employed by the defendant herein, which said defendant herein was at said time engaged in business in the state of Ohio and subject to the terms of the workmen's compensation law of the state of Ohio, hereinabove referred to.

9. A certified copy of the finding of facts and order to the employer, of the Industrial Commission of Ohio, in this claim, (see Appendix C) was sent to this defendant on or about the first day of July, 1929, in accordance with Section 1465-74 of the General Code of Ohio.

10. Plaintiff further says that the defendant failed, neglected and refused to pay the claim or furnish a bond thereto within a period of ten days after notification of such finding and award as ordered by the Industrial Commission of Ohio, and that the defendant continues to fail, neglect and refuse to pay the same and the state of Ohio has paid the said Mrs. Cora Tidwell the full amount of the award out of the state fund.

Wherefore, plaintiff prays that the defendant may be required to answer the allegations hereinbefore set forth and that upon a final hearing a judgment be granted against the defendant in the sum of four thousand nine hundred ten dollars and sixty-four cents ($4910.64), together with interest and the costs of this action and to such further relief as the plaintiff may be entitled in the premises.

The State of Ohio,
By GILBERT BETTMAN,
Attorney General,
OSCAR A. BROWN,
Assistant Attorney General,
Counsel for Plaintiff.

Verification.

United States of America, State of Ohio, County of Franklin, ss.:

Gilbert Bettman, being duly sworn on oath says that he is the duly elected, qualified and acting attorney general of the state of Ohio and that he has read the aforegoing petition and knows the contents thereof and that the same is true to his own knowledge and belief and that as such attorney general of the state of Ohio, he is duly authorized to pray leave to file the said petition.

Gilbert Bettman,
Attorney General of the State of Ohio.

Subscribed and sworn to before me by Gilbert Bettman this twenty-first day of December, 1931.

[Seal.] Robert B. Barcus,
Notary Public in and for Franklin County, Ohio.

My commission expires the sixteenth day of July, 1933.

WAIVER OF PROCESS.

The defendant hereby waives the issuance and service of summons and voluntarily enters its appearance herein as defendant this twenty-first day of December, 1931.

The Chattanooga Boiler and Tank Company,
By ARNOLD, WRIGHT, PURPUS & HARLOR,
Its Attorneys.

APPENDIX A.

The Constitution of Ohio.

Article II.

Sec. 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be

expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this Constitution.

(As amended. Effective Jan. 1, 1924. 110 O. L. 631.)

Sec. 1465-74. Any employe whose employer has failed to comply with the provisions of Section 1465-69, who has been injured or has suffered an occupational disease in the course of his employment, and which was not purposely self-inflicted, or his dependents in case death has

ensued, may, in lieu of proceedings against his employer by civil action in the courts, as provided in Section 1465-73, file his application with the commission for compensation and the commission shall hear and determine such application for compensation in like manner as in other claims and shall make such award to such claimant as he would be entitled to receive if such employer had complied with the provisions of Section 1465-69, and such employer shall pay such award in the manner and amount fixed thereby or shall furnish to the Industrial Commission a bond, in such an amount and with such sureties as the commission may require, to pay such employe such award in the manner and amount fixed thereby. In the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto, or to furnish such bond, within a period of ten days after notification of such award, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the commission, and the commission shall certify the same to the attorney general who shall forthwith institute a civil action against such employer in the name of the state, for the collection of such award. In such action it shall be sufficient for plaintiff to set for(th) a copy of the record of proceedings of the commission relative to such claims as certified by the commission to the attorney general and to state that there is due to plaintiff on account of such finding and award of the commission a specified sum which plaintiff claims with interest. A certified copy of such record of proceedings in such claim shall be attached to the petition

and shall constitute prima facie evidence of the truth of the facts therein contained. The answer or demurrer to such petition shall be filed within ten days, the reply or demurrer to the answer within twenty days, and the demurrer to the reply within thirty days after the return day of the summons or service by publication. All motions and demurrers shall be submitted to the court within ten days after the same are filed. As soon as the issues are made up in any such case, it shall be placed at the head of the trial docket and shall be first in order for trial. The cause of action herein provided and the cause of action provided by Section 1465-75 may be joined in one action against an employer, and the amount of any premium paid or recovered from such employer for the period not exceeding six months during which such injury or disease, or injury or disease resulting in death, occurred shall be credited against the amount of any judgment for compensation recovered pursuant to the provisions of this section. The amount recovered in such action from such employer shall be paid into the state insurance fund. And any employe whose employer has elected to pay compensation to his injured, or to the dependents of his killed employes in accordance with the provisions of Section 1465-69, may, in the event of the failure of his employer to pay such compensation or furnish such medical, surgical, nursing and hospital services and attention or funeral expenses, file his application with the commission for the purpose of having the amount of such compensation and such medical, surgical, nursing and hospital services and attention or funeral expenses

determined; and thereupon like proceedings shall be had before the commission and with like effect as hereinbefore provided.

And the commission shall adopt and publish rules and regulations governing the procedure before the commission provided in this section and shall prescribe form of notices and the mode and manner of serving the same in all claims for compensation arising under this section. Any suit, action, proceeding or award brought or made against any employer under the provisions of this section, may be compromised by the commission, or such suit, action or proceeding may be prosecuted to final judgment as in the discretion of the commission may best subserve the interests of the state insurance fund.

The payment of any judgment recovered in the manner provided herein shall entitle such claimant to the compensation provided by this act for such injury, occupational disease or death. The attorney general shall, as soon as the circumstances warrant, and not more than two years after the date of such award made by the commission, certify to the commission the result of his efforts to recoup the state insurance fund as herein provided, and if he certifies that such award cannot be collected in whole, the award shall be paid from the surplus created by Section 1465-54, and any sum then or thereafter recovered on account of such award shall be paid to the commission and credited to such fund as the commission may designate.

(As amended 111 O. L., 222. Effective July 14, 1925.)

APPENDIX B.

Agreed Statement of Facts.

It is hereby stipulated and agreed by and between the parties hereto that the facts hereinafter set forth shall be taken as true as though established by competent evidence taken in open court. It is further stipulated that the court may take judicial notice of the constitutional provisions, statutes and decisions of the states of Ohio and Tennessee.

1. Plaintiff is the duly elected, qualified and acting attorney general of the state of Ohio and brings this action on behalf of the state of Ohio in his official capacity, the state of Ohio being the real party in interest.

2. The defendant is a corporation organized and existing under and by virtue of the laws of the state of Tennessee with its principal place of business located in the city of Chattanooga, Tennessee. It has never qualified as a foreign corporation, to do business in the state of Ohio.

3. Substantially all of the business of the defendant was and is transacted in the state of Tennessee where its plant for the construction and manufacture of boilers and tanks is situated, but when such boilers and tanks were and are sold by the defendant to the purchasers in various states the installation and erection of them was and is necessary in such other states. The defendant has never had any office or place of business in the state of Ohio

but it did install certain boilers and tanks in the state of Ohio for the period of time and under the circumstances hereinafter stated.

4. On or about September 2, 1926, the defendant entered into an oral contract of hire or employment in Chattanooga, Tennessee, with one William R. Tidwell. This contract provided and contemplated that the services to be performed by Tidwell were to be performed in the state of Tennessee and such other states as the defendant might from time to time designate; that at times Tidwell was employed as a rivet-heater in installation work by said defendant. Tidwell was a citizen and resident of the state of Tennessee. After his death his widow, Mrs. Cora Tidwell, became a resident and citizen of the state of Georgia.

5. The defendant had accepted and duly complied with the workmen's compensation act of the state of Tennessee and Tidwell had also accepted the act. On May 2, 1929, his widow, Mrs. Cora Tidwell, filed an application for compensation under the workmen's compensation act of Tennessee for the death of her husband and no action was taken on said application. The said Mrs. Cora Tidwell thereafter filed suit in the Circuit Court of Hamilton county at Chattanooga, Tennessee, to recover as provided by the workmen's compensation act of Tennessee, for the death of her husband and said action is now pending.

6. Sometime prior to April 9, 1928, defendant sold to Ironton By-Products Coke Company of Ironton, Ohio, certain tanks manufactured by defendant in the state

of Tennessee and under the contract of sale which was consummated in Chattanooga, Tennessee, the defendant was required to install and erect said tanks in Ironton, Ohio. On April 9, 1928, Tidwell, together with three other employes of defendant, citizens and residents of the state of Tennessee, came at the direction of the defendant from Chattanooga, Tennessee, to Ironton, Ohio, to erect and install said tanks. The defendant hired four additional employes in the city of Ironton, all of whom were citizens and residents of the state of Ohio. The work of installation in Ironton, Ohio, was completed on May 11, 1928. While engaged in erecting and installing one of said tanks and while in the course and within the scope of his employment, said Tidwell, on May 5, 1928, fell from the top of said tank sustaining a fracture at the base of the skull and as a direct and proximate result of said injury died the following day, May 6, 1928, at Ironton, Ohio.

7. The defendant on and about May 6, 1928, had in its employ within the state of Ohio more than three workmen or operatives regularly employed in its business.

8. The defendant did not comply with the provisions of the workmen's compensation act of Ohio either by becoming a subscriber to the state insurance fund or by electing to pay compensation direct to injured employes or to their dependents in case of death.

9. Mrs. Cora Tidwell, wife of William R. Tidwell, deceased, filed her application on October 16, 1928, with the Industrial Commission of Ohio for compensation from the defendant herein on account of the death of her hus-

band in accordance with the provisions of the workmen's compensation act of the state of Ohio, the same being Section 1465-74 of the General Code of Ohio; that thereafter, on June 14, 1929, the Industrial Commission of Ohio, after notice to the defendant, considered the application of said Mrs. Cora Tidwell and found and determined that she was wholly dependent on her deceased husband at the time of his death and that she was entitled under the workmen's compensation law of Ohio to the compensation for the death of her husband in the sum of four thousand eight hunderd dollars and sixty-four cents ($4,800.64), the same being compensation for two hundred eight (208) weeks at the rate of twenty-three dollars and eight cents ($23.08) per week, and also to the sum of one hundred ten dollars ($110.00) medical and funeral expenses. The commission further found that the defendant was an employer within the meaning of the workmen's compensation law of Ohio and subject to the provisions therein and ordered the defendant to pay the above amounts to the Industrial Commission of Ohio.

10. In the proceedings before the industrial commission of Ohio the defendant specially appeared and denied the jurisdiction, power and authority of the Industrial Commission of Ohio to make an award upon said application.

11. The defendant has failed and refused to pay the amount of the award or to be bound by the proceedings and determination of the Industrial Commission of Ohio.

12. Mrs. Cora Tidwell, the claimant, has been paid,

by virtue of the provisions of Section 1465-74, General Code of Ohio, by the Industrial Commission of Ohio the full amount of the award, from the surplus created by Section 1465-54 of the General Code of Ohio.

13. The defendant is not a citizen or resident of the state of Ohio nor does it have an office or agent within said state and service of summons cannot be had upon it in an action brought against it by the state of Ohio through its attorney general pursuant to Section 1465-74 of the General Code of Ohio.

The State of Ohio.
By GILBERT BETTMAN,
Attorney General,
OSCAR A. BROWN,
Assistant Attorney General,
Counsel for Plaintiff.

The Chattanooga Boiler & Tank Company,
By ARNOLD, WRIGHT, PURPUS & HARLOR,
Its Attorneys.

APPENDIX C.

State of Ohio, County of Franklin, ss.:

I, T. A. Edmondson, hereby certify that I am the duly appointed, qualified and acting secretary of the Industrial Commission of Ohio and as such am duly authorized in the premises:

That the attached are true and correct copies of the finding of facts and the order issued by the Industrial Commission of Ohio on the fourteenth day of June, 1929, in the case of Mrs. Cora Tidwell v. Chattanooga Boiler & Tank Co., Chattanooga, Tenn., known on the records of the commission as Claim No. 3096, Section 27.

In Witness Whereof, I have hereunto subscribed my hand and affixed the official seal of said commission this first day of April, 1931.

T. A. Edmonson,
Secretary.

[Seal.]

Finding of Facts and Order to Employer, Under Section 27 of Compensation Act.

No. 3096-27.

Name, W. R. Tidwell, Deceased.

Applicant, Mrs. Cora Tidwell.

To Chattanooga Boiler & Tank Co., N. Main St., Chattanooga, Tenn.

Notice is hereby given of the following findings of fact this day made by The Industrial Commission of

Ohio in the claim of Mrs. Cora Tidwell, 76 N. 7th St., Dalton, Georgia, heretofore filed with said commission by virtue of the provisions of Section 27 of the workmen's compensation act; on account of the death of W. R. Tidwell (hereinafter referred to as deceased).

1. Deceased on the fifth day of May, 1928, sustained an injury which resulted in his death on the sixth day of May, 1928.

2. Deceased was employed at the time of injury causing death by Chattanooga Boiler & Tank Co., Chattanooga, Tenn.

3. Prior to and at the time of said injury, said employer employed three or more workmen or operatives regularly in the same business or in and about the same establishment in which deceased was employed.

4. Said employer was not on said date a subscriber to the state insurance fund, as established by the workmen's compensation act (103 O. L. 72).

5. Said employer had not on said date elected to pay compensation, etc., direct, under the provisions of Section 22, of said act.

6. The injury causing death of deceased was sustained in the course of employment, and at the time and in the manner alleged in the application.

7. Said injury was not purposely self-inflicted.

8. Prior to the time of filing claim with this commission, said Mrs. Cora Tidwell, applicant, had not begun a civil action against the employer of deceased on account of the death of deceased.

9. That the following persons were dependents of deceased: Mrs. Cora Tidwell, widow.

10. Applicant has incurred for medical and funeral expenses, etc., the sum of $110.00 ($65.00 previously paid by employer).

The commission therefore finds that there is due said applicant, Mrs. Cora Tidwell, the following amounts for compensation, medical and funeral expenses, etc.:

Compensation at the rate of $11.54 per week for 416 weeks..... $4,800.64

Dr. O. H. Benninger, 112 S. 6th St., Ironton, Ohio..... $25.00

Medical and funeral expenses, etc.—

Bingaman & Jones, Ironton, Ohio.. 85.00 110.00

Within ten (10) days from the date hereof, you will pay to said applicant, in the manner indicated below, the amounts named above, in accordance with provisions of Section 27 of said act.

Compensation to be paid in bi-weekly installments of $11.54 each, beginning May 7, 1928.

Date at Columbus, this fourteenth day of June, 1929.

Attest:

T. A. Edmonson,
Secretary.

Wellington T. Leonard,
Chairman.

State of Ohio, County of Franklin, ss:

I, the undersigned, chief of the division of workmen's compensation of the Industrial Commission of Ohio, do hereby certify that the findings of fact set forth in the

foregoing notice is a true and accurate copy of the findings of fact made in Claim No. 3096-27, Cora Tidwell, claimant, on the fourteenth day of June, 1929, upon the hearing of said claim held before said commission at its office in the city of Columbus, Ohio, and that said commission did then and there order that a certified copy of said findings be forthwith transmitted by registered United States mail to said

In witness whereof I have hereunto subscribed my name and affixed the seal of said commission this first day of July, 1929.

Ross Hedges,
Chief, Division of Workmen's Compensation.

IN THE

Supreme Court of the United States

The State of Ohio, Plaintiff, vs. The Chattanooga Boiler and Tank Company, a Tennessee Corporation, Chattanoga, Tennessee, Defendant.		No. ..... Original At Law.

ANSWER.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

For its answer to the petition of the state of Ohio the defendant, The Chattanooga Boiler and Tank Company, admits all of the allegations contained in paragraphs numbered one (1), two (2), three (3), nine (9) and ten (10) in said petition.

With respect to paragraph numbered four (4) of the petition, defendant admits that on or prior to May 5, 1928, William R. Tidwell, deceased, was in the employ of the defendant, and that the defendant was engaged in

the manufacture and construction of boilers and tanks in Chattanooga, Hamilton county, Tennessee; denies that it was engaged in the construction of boilers and tanks in the state of Ohio; admits that it had in its employ on and prior to May 5, 1928, three or more workmen or operatives regularly employed in its business; denies that on and prior to May 5, 1928, or at any other time, it was engaged in doing business in the state of Ohio; admits that on May 5, 1928, three of its regularly employed workmen were engaged, in the city of Ironton, Ohio, in the installation and erection of certain tanks sold by defendant to Ironton By-Products Coke Company.

With respect to the allegations contained in paragraph numbered five (5) of the petition, defendant says that it did not comply with the Workmen's Compensation Act of Ohio either by becoming a subscriber to the state insurance fund or by electing to pay compensation direct to injured employes, as provided in Section 22 of said act, being Section 1465-69 of the General Code of Ohio.

With respect to paragraph numbered six (6) of the petition, defendant denies that the said William R. Tidwell's employment was limited or restricted to the erection and installation in the state of Ohio of certain tanks manufactured by defendant; admits that on May 5, 1928, said Tidwell was engaged in erecting and installing in the city of Ironton, Ohio, one of the tanks manufactured by the defendant in Chattanooga, Tennessee, and while in the course and in the scope of his employment said Tidwell fell from the top of the tank sustaining a fracture at the base of the skull, and as a direct and proximate result of said injury he died on May 6, 1928.

With respect to paragraph numbered seven (7) of the petition, defendant admits that Mrs. Cora Tidwell, widow of William R. Tidwell, filed her application on October 16, 1928, with the Industrial Commission of Ohio, for compensation from the defendant on account of the death of her husband, pursuant to Section 27 of the Workmen's Compensation Act of Ohio, being Section 1465-74 of the General Code of Ohio; that on June 14, 1929, the Industrial Commission of Ohio, after notifying the defendant thereof, heard the application of said Mrs. Cora Tidwell and found and determined that she was wholly dependent on the decedent at the time of his death and that she was entitled to compensation in the amount set forth in said paragraph numbered seven (7). Defendant says that without in any way subjecting itself to the assumed jurisdiction of the Industrial Commission of Ohio, it appeared specially and denied the jurisdiction and authority of said commission to make an award upon said application of Mrs. Cora Tidwell.

Defendant denies all of the allegations of paragraph numbered eight (8) in the petition.

DEFENSE.

For its defense defendant says that substantially all of its business was and is transacted in the state of Tennessee where its plant for the construction and manufacture of boilers and tanks is situated; that when such boilers and tanks were and are sold by the defendant to purchasers in various states the installation and erection of

them was and is necessary in such other states; that the defendant has never had any office or place of business in the state of Ohio.

On or about September 2, 1926, in Chattanooga, Tennessee, defendant entered into an oral contract of employment with said William R. Tidwell, a citizen and resident of Tennessee; that said contract of employment provided and contemplated that the services to be performed by Tidwell were to be performed in the state of Tennessee and such other states as the defendant might from time to time designate.

At the time said contract was entered into defendant had accepted and duly complied with the Workmen's Compensation Act of Tennessee and the said Tidwell also accepted the Act. There was no provision or exception in said contract of employment regarding compensation or damages for injuries sustained during said employment other than the Workmen's Compensation Act of Tennessee.

Wherefore, the defendant prays that this Honorable Court may dismiss the petition and enter a proper judgment for the defendant.

The Chattanooga Boiler and Tank Company,
By HARRY B. ARNOLD,
Its Attorney.

FRANCIS J. WRIGHT,
Of Counsel.

State of Ohio, Franklin County, ss.:

Francis J. Wright, being first duly sworn, deposes and says that he is one of the attorneys for The Chattanooga Boiler and Tank Company, defendant in the above entitled action, and duly authorized in the premises; that defendant is a corporation, and that the admissions, denials and allegations contained in the foregoing answer are true as he verily believes.

Francis J. Wright.

Sworn to before me and subscribed in my presence this nineteenth day of January, 1932.

M. O. MacConathy,

[Seal.] Notary Public Franklin County, Ohio.

FILE COPY

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CHARLES ELMORE

Supreme Court of the United States

No. 18, Original

OCTOBER TERM 1932.

STATE OF OHIO,

Plaintiff,

vs.

THE CHATTANOOGA BOILER AND TANK COMPANY, A TENNESSEE CORPORATION, CHATTANOOGA, TENNESSEE,

Defendant.

Original at Law.

BRIEF ON BEHALF OF PLAINTIFF THE STATE OF OHIO.

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Defendant.

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BRIEF ON BEHALF OF PLAINTIFF THE STATE OF OHIO.

STATEMENT OF FACTS.

The defendant is a corporation organized under the laws of the state of Tennessee and is engaged in that

state in the construction and manufacture of boilers and tanks. When, however, such products are sold by the defendant to purchasers in other states, the installation and erection of them is necessary in such other states. The defendant corporation has never had an office or place of business in the state of Ohio.

Some time in 1928, the defendant sold to the Ironton By-Products Coke Company, an Ohio corporation located in the city of Ironton, Ohio, certain tanks manufactured by the defendant in the state of Tennessee and the defendant was required under the contract of sale to install and erect said tanks in Ironton, Ohio. The work in Ohio, required in the installation and erection of the boilers and tanks sold by the defendant, began on April 9, 1928, and was completed on May 11, 1928. When the defendant began the work in the state of Ohio, it brought four employes, citizens and residents of the state of Tennessee, to perform the work for the defendant in the erection and installation of the tanks in Ohio. The defendant, in the process of fulfilling that work, hired four additional employes in the city of Ironton, all of whom were citizens and residents of the state of Ohio.

While engaged in erecting and installing one of the tanks in Ironton, Ohio, William R. Tidwell on May 5, 1928, fell from the top of the tank sustaining a fracture at the base of the skull and as a direct and proximate result of this injury died the following day.

William R. Tidwell, the deceased, was for some time prior to his death one of the regular employes of the defendant, having entered employment in the state of

Tennessee. The deceased was particularly employed as a rivet heater in the installation work done by the defendant.

The defendant, on May 5, 1928, the day of the fatal injury to Mr. Tidwell, had in its employ within the state of Ohio three or more workmen regularly employed in its business. The Chattanooga Boiler and Tank Company did not comply with the provisions of the workmen's compensation act of Ohio either by becoming a subscriber to the state insurance fund or by electing to pay compensation direct to injured employes or their dependents in case of death. The defendant did, however, comply with the workmen's compensation act of the state of Tennessee.

Following the death of William R. Tidwell, his widow Mrs. Cora Tidwell, a citizen and resident of the state of Georgia, filed an application with the Industrial Commission of Ohio for death benefits on account of the death of her husband and in accordance with the provisions of the workmen's compensation act of the state of Ohio. Subsequently, the Industrial Commission, after notice to the defendant, considered the application and found and determined that the said widow is entitled to an award under the Ohio law as a total dependent on her deceased husband, and granted an award in the sum of $4800.64 together with a sum of $110.00 for medical and funeral expenses.

The commission further found that the defendant was an employer within the meaning of the workmen's compensation law of Ohio and therefore ordered the defend-

ant to pay the above award into the state insurance fund of Ohio, which the defendant has failed and refused to do. (The above facts are stipulated and agreed. See Appendix B in the petition.)

THE PROBLEM IN THE CASE.

The problem in this case under the agreed statement of facts relates to the jurisdiction of the Industrial Commission of Ohio in making the award in favor of the widow and whether at the time of the fatal injury to William R. Tidwell the defendant company was amenable to the Ohio workmen's compensation law and therefore liable for the payment of the award.

OUTLINE OF ARGUMENT.

I.

The Ohio workmen's compensation law is a valid exercise of the police power and is of the compulsory type.

II.

Under the Ohio act, a status is created regulating the employer and the employe within the territorial jurisdiction.

III.

The defendant was doing business in Ohio at the time of the fatal injury and was amenable to the Ohio law.

IV.

In the absence of federal regulation over the subject matter, the Ohio act is applicable even in interstate employment.

V.

No conflict of laws exists since Ohio, the state of injury, granted compensation under its distinctly compul sory system.

VI.

The widow's claim was denied by the Supreme Court of Tennessee solely by reason of Ohio taking jurisdiction.

VII.

The Tennessee act is optional or elective creating a contractual relationship but is not exclusive as to remedy in proceedings outside of that state.

VIII.

The petitioner is entitled to equitable contribution from the defendant, the award having been paid in full out of the state insurance fund of Ohio.

THE ARGUMENT.

I.

THE OHIO WORKMEN'S COMPENSATION LAW IS A VALID EXERCISE OF THE POLICE POWER AND IS OF THE COMPULSORY TYPE.

The present Ohio workmen's compensation law was enacted in pursuance of Article II, Section 35, of the Ohio Constitution which reads in part as follows:

> "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease."

This act is embodied in the General Code of Ohio under Sections 1465-37 to 1465-112, inclusive.

It will be noted that Ohio's act is compulsory as distinguished from the elective or optional type of compensation law. It rests upon the police power of the state to regulate the status of the employer and employe and

the relationship of employment within the boundaries of Ohio. The Supreme Court of Ohio upheld its constitutionality as a valid exercise of the police power. It does not use public funds for private purposes; it does not take private property without due process of law; it does not deprive parties of the freedom of contract; it does not make an unjust classification and it does not invest the Industrial Commission with a judicial power. State v. Creamer, 85 O. S., 349.

The constitutionality of the act was also upheld by this court in a case which came up from Ohio, as a proper exercise of the police power of the state. Jeffry Mfg. Co. v. Blagg, 235 U. S., 571. Similar acts enacted under the police powers of the state have been upheld by this court in the following cases: N. Y. Central Ry. v. White, 243 U. S., 188 (N. Y.); Mt. Timber Co. v. Washington, 243 U. S., 219 (Wash.); 250 U. S., 400 (Ariz.).

The particular section of the General Code upon which the award was made in the instant case is 1465-74 of the General Code of Ohio. This section, insofar as it is applicable to this case, reads in part as follows:

> "Any employe whose employer has failed to comply with the provisions of Section 1465-69, who has been injured or has suffered an occupational disease in the course of his employment, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceedings against his employer by civil action in the courts, as provided in Section 1465-73, file his application with the commission for compensation and the commission shall hear and determine such application for compensation in like manner as in other claims and shall make such award to such

claimant as he would be entitled to receive if such employer had complied with the provisions of Section 1465-69, and such employer shall pay such award in the manner and amount fixed thereby or shall furnish to the Industrial Commission a bond, in such an amount and with such sureties as the commission may require, to pay such employe such award in the manner and amount fixed thereby. In the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto, or to furnish such bond, within a period of ten days after notification of such award, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the commission, and the commission shall certify the same to the attorney general who shall forthwith institute a civil action against such employer in the name of the state, for the collection of such award. In such action it shall be sufficient for plaintiff to set forth a copy of the record of proceedings of the commission relative to such claims as certified by the commission to the attorney general and to state that there is due to plaintiff on account of such finding and award of the commission a specified sum which plaintiff claims with interest. * * * The payment of any judgment recovered in the manner provided herein shall entitle such claimant to the compensation provided by this act for such injury, occupational disease or death. The attorney general shall, as soon as the circumstances warrant, and not more than two years after the date of such award made by the commission, certify to the commission the result of his efforts to recoup the state insurance fund as herein provided, and if he certifies that such award cannot be collected in whole, the award shall be paid from the surplus created by Section 1465-54, and any sum then or thereafter recovered on account of such award shall be paid to the commission and credited to such fund as the commission may

designate. (As amended 111 O. L., 222. Effective July 14, 1925. This is Section 27 of the act.)"

The above section was interpreted in the case of Fassig v. State, ex rel., 95 O. S., 232, holding a non-complying employer liable for an award made by the Industrial Commission, wherein the court added "the provisions of Section 27 (1465-74 G. C.), of the workmen's compensation act constituted a valid exercise of the legislative power not repugnant to the federal or Ohio Constitution nor to any legislation contained in either."

The United States Supreme Court in the N. Y. Central Ry. v. Sarah White case, supra, was called upon to construe the validity of an award made in New York under the workmen's compensation law of New York. In upholding the compulsory system of insurance, the court stated:

> "and we recognize that the legislation under review does measurably limit the freedom of the employer and an employe to agree respecting the terms of employment and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state."

The state of Arizona, like Ohio, has a compulsory workmen's compensation law as to the rights and obligations of employer and employe. The Supreme Court of that state in the case of Ocean Accident & Guar. Corp. v. Indus. Comm. of Ariz., 257 Pac., 644, in construing the Arizona act, said:

> "This act, so far as the employer is concerned is compulsory in its nature. He has no option as to

> whether he will accept or reject it and the whole language, both of the constitutional amendment authorizing it and of the act itself, clearly shows that they were passed not on the old theory of contract of parties but upon the inherent rights of the state recognized by the Supreme Court of the United States by virtue of its police power to establish certain rules regulating the status of employer and employe."

In the Arizona case above, it is to be noted that the injured employe was hired in the state of California but the injury occurred in Arizona. The payment of compensation in Arizona was upheld by the Supreme Court of that state regardless of the provisions of the California act.

A reading of the Ohio constitutional provision creating a compulsory state insurance fund, together with the decisions interpreting the Ohio act and similar acts indicate that the compulsory type of workmen's compensation act is distinctly different from the optional or elective type.

II.

UNDER THE OHIO ACT, A STATUS IS CREATED REGULATING THE EMPLOYER AND THE EMPLOYE WITHIN THE TERRITORIAL JURISDICTION.

Since the Ohio act is compulsory, a status is created which affects the relationship between the employer and the employe within the territorial limits of the state.

with no distinction on the basis of citizenship or legal residence of the parties involved in that relationship. Section 1465-60, General Code of Ohio, defines who is an employer.

> "* * * **Every person, firm and private corporation,** including any public service corporation, that has in service three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written." (Boldface ours.)

Section 1465-61, General Code of Ohio, defines who is an employe.

> "* * * **Every person in the service of any person, firm or private corporation,** including any public service corporation, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer. * * *"

The language in the above two sections does not in any manner suggest any limitation as to the citizenship or legal residence of the employer and employe.

In Smith v. Heine Safety Boiler Co., 119 Me., 552, the Industrial Accident Commission of Maine was held to have jurisdiction to hear the claim of the widow of an employe who was accidentally killed while working in that state although the employer was a foreign corporation and the decedent was not a resident of Maine and the contract of employment was made in a third state.

The compulsory type of workmen's compensation law which creates a status for the parties precludes the idea of a contractual relationship inconsistent with the policy of the state.

The United States Supreme Court in Cudahy Packing Co. v. Paramore, 263 U. S., 418, Mr. Justice Southerland at page 243 stated:

> "Workmen's compensation legislation rests upon the idea of status and not upon that of implied contract."

The Paramore case was cited with approval in Bountiful Brick Co. v. Giles, 276 U. S., 154.

The employer cannot lessen his obligations and the employe cannot waive his rights under the statute by agreement. Such agreements have been held void as against public policy in addition to being prohibited under the act. Section 1465-94, General Code of Ohio.

A proceeding for compensation under the New Jersey Act was held to be neither an action in contract nor in tort but really a proceeding to enforce a statutory duty. Barr v. Court of Common Pleas, 88 N. J. L., 128.

If the defendant had complied with the Ohio act, such an act would have been included in the contract of employment which was entered into between employer and the employe in the instant case in Tennessee, however, by reason of the failure of the employer to comply with the Ohio act, the law super-imposes the Ohio provisions and makes them part of the Tennessee contract.

In Gooding v. Ott, 77 W. Va., 487, the Supreme Court of Appeals said:

> "Where the statute compels submission by the employer and employe, there is no contract, as a general rule enforceable outside of the state."

In Carl Hagenbeck, et al. v. Randall, Ind. App., 126, N. E. 501, an Indiana corporation was held liable to pay compensation under the act for injury to an employe in Indiana. The Industrial Board, not lacking jurisdiction by reason of the contract of employment, which was entered into in Ohio, the court concluded that the employer could not relieve itself of a statutory obligation by a foreign contract, its obligation under the Indiana compensation act being super-imposed upon the Ohio contract as a condition of performance in Indiana.

The Supreme Court of Ohio, reasoning along the same lines as the Indiana court in the case above, held in Thornton v. Duffy, 99 O. S., 120,

> "Contracts of indemnity between employers and an insurance company are subject to the power of the Legislature to impose conditions upon the employers. The state's power to act cannot be hampered by previous contracts."

It is also to be noted that by reason of the Tennessee act being optional or elective in its nature, it could not be given effect in Ohio where a different system of compensation prevails. By virtue of the status created under the Ohio act operating equally upon all persons, the defendant by employing men in Ohio for whom compensation may be provided by Ohio legislation, owed a

definite obligation to the state insurance fund and this duty or obligation on the part of the employer to the state of Ohio cannot be denied or hampered by the legislation of any other state. Neither is the inconvenience to the employer an element to be considered in this question for many employers engaged in nation-wide business may be required to comply with the workmen's compensation laws of every state in the union.

It is therefore respectfully submitted that the Industrial Commission of Ohio had the power to adjudicate the rights of the widow of the decedent and to make the award for death benefits under the Ohio law.

III.

THE DEFENDANT WAS DOING BUSINESS IN OHIO AT THE TIME OF THE FATAL INJURY AND WAS AMENABLE TO THE OHIO LAW.

The agreed statement of facts shows that the work in Ohio by this defendant constituted the erection and installation of tanks and that it was necessary, in addition to the four employes sent from Tennessee, to hire four additional employes in Ohio. The work of installing and erecting these tanks and boilers required ordinary labor and consumed a period of time from April 9, 1928, up to and including May 11, 1928. These eight employes were admittedly engaged in the regular business of this defendant and at the time of the fatal injury to William R. Tidwell, were engaged in the defendant's business in Ohio.

Section 5508 of the General Code of Ohio provides:

> "All foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be, imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater power."

This court in the case of Browning v. The City of Waycross, 233 U. S., 16 (Ga.), held that a foreign corporation was doing business in Georgia because the affixing of lightning rods to houses was merely the doing of a local act after the interstate commerce had completely terminated, and it was not within the power of the parties by the form of their contract to convert what was exclusively a local business subject to state control, into an interstate commerce business protected by the commerce clause.

The Waycross case is a leading case on the subject of what constitutes the doing of local business within a state and the facts therein are particularly applicable to the instant case because it relates to the subject of installation. The test laid down by the United States Supreme Court in the Waycross case intimated that in order to preserve the character of an interstate commerce transaction, it is necessary that there be some intrinsic and peculiar quality or inherent complexity of the article in order to install or put it in place within the state. In our case, however, applying the test of the Waycross case, the article sold by the defendant was not of such inherent complexity and only required ordinary labor to install or erect the tanks in Ohio.

It is interesting to note that the Supreme Court of Tennessee interpreting what constitutes doing business, followed the test laid down in the Waycross case, and in Peck-Williams Heating & Vent. Co. v. McKnight & Merz, 140 Tenn., 563, held:

> "A foreign corporation which furnished and installed a heating and ventilating equipment in a theatre is 'doing business' in the state so as to require its qualification as a foreign corporation. It did not appear that the equipment furnished was of such a complicated nature that an expert from its factory had to be sent to install it. The company employed local workmen to do part of the work."
>
> See also Lummus Cotton Gin Co. v. Arnold, et al., 269 S. W., 706 (Tenn.).

Coming to the Ohio cases as to what constitutes "doing business", we find that the installation of three turbine engines is "doing business." Beech v. Kerr Turbine Co., 243 Fed., 706 (Ohio). The installation of machinery constitutes local business. Israel v. The Champion Shoe Mach. Co., 25 N. P. (n. s.), 507 (Ohio). Also, where a mechanic of a company is sent to inspect, test, and repair machines manufactured by the company, that constitutes "doing business in Ohio." Cone v. New Britain Mach Co., 20 Fed. (2d), 593 (Ohio). The Court of Appeals of Ohio in National Sign Corp. v. Maccar Cleveland Sales Corp., 33 O. App., 89, said the shipping of signs into Ohio is interstate transportation but arranging for locations, erection, and maintenance is intrastate service, performed in Ohio. The court further said:

> "Where the installation is not merely an incident of the sale but the principal part of the transaction

and the sale an incident, the transaction is no longer protected by the interstate commerce laws. This is especially true if the installation requires the employment of labor within the state, both skilled and unskilled."

Installation work has been held to constitute the doing of local business in the following cases:

U. S. Constr. Co. v. Hamilton Nat'l Bank, 126 N. E., 866 (Ind.);
B. F. Sturdevant Co. v. Adolph, etc., 196 Mich., 552;
A. H. Andrews Co. v. Colonial Theatre Co., 283 Fed., 471 (Mich.);
United Shoe Mach. Co. v. Ramlose, 210 Mo., 631;
W. B. Hays v. W. R. Robertson, et al. 271 Mo., 475;
Bryan v. S. F. Bowser Co., 209 S. W., 189 (Tax.);
Kinnear & Gages Mfg. Co. v. Miner, 89 Vt., 572.

The defendant having localized his regular business in Ohio subjected himself to all of the statutory rights and liabilities under the Ohio law and the subject of personal injury received by a workman in the course of his employment is within the control of the sovereign power where the injury occurs. The trend of the development of the law historically considered has been toward the territorial law before which all are equal. In David v. New York & Northeastern Ry., 143 Mass., 301, the court stated "it must certainly be the right of each state to determine by its law under what circumstances an injury to the person will afford a cause of action."

Concluding this point, it is respectfully submitted that the defendant came into Ohio with four employes and in addition hired four Ohio employes, all of whom were en-

gaged in ordinary labor in the erection and the installation of the tanks at Ironton, Ohio, and that that work consumed a period of nearly six weeks. Under the test laid down by the Supreme Court of the United States in the Wayeross case and the interpretation of both the states of Ohio and Tennessee, this employer was doing business in the state of Ohio at the time of the fatal injury to William R. Tidwell and therefore the defendant became an employer within the meaning of the workmen's compensation act of Ohio and subject to all of the rights and liabilities provided therein.

IV.

IN THE ABSENCE OF FEDERAL REGULATION OVER THE SUBJECT MATTER, THE OHIO ACT IS APPLICABLE EVEN IN INTERSTATE EMPLOYMENT.

The above discussion definitely indicates that the defendant was doing business in the state of Ohio, however, assuming that the sale and the subsequent erection and installattion of the tanks was a transaction in interstate commerce, it is submitted that the Ohio act is nevertheless applicable in the absence of federal regulation.

There is no contention on the part of the defendant that the Congress of the United States has fixed any rule of liability or method of compensation for the employes engaged in the regular business of the Chattanooga Boiler & Tank Company.

The trend of the decisions, many of which emanated from this court, point to the conclusion that local compensation acts should control actions thereunder in preference to federal legislation. It seems clear that a state may, as long as it does nothing more than legitimately exercise its reserve police power, enact laws which will be valid although they may incidentally affect interstate commerce. Local laws covering the question of the relationship between the employer and the employe with respect to industrial accidents have their source in the powers which the state reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not within the meaning of the Constitution, or considered in their own nature regulations of interstate commerce.

In the case of Hendrick v. Maryland, 235 U. S. 610, the Supreme Court of the United States in the opinion delivered by Mr. Justice McReynolds says:

> "In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines,—a practical measure of size, speed and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of health, safety, and comfort of their citizens; * * *."

In Austin v. Tennessee, 179 U. S. 343, at 349,, the court said:

> "We have had repeated occasion to hold, where state legislation has been attacked as violative * * * of the power of Congress over interstate commerce * * * that, if the action of the state Legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

The same rule is laid down in the case of Kelley v. Great Northern Ry. Co., 152 Fed. 211, which held that laws affecting the liability of common carriers for injuries to employes are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce, and that a state may, as long as Congress has not legislated on the particular subject, enact such laws in the exercise of its police power without invading the exclusive power of Congress.

If the contract of sale entered into between the Tennessee corporation and the Ironton By-Products Coke Company contemplated an interstate transaction, nevertheless the installation and erection of the tanks in Ohio over a period of six weeks, with eight employes half of whom were Ohio citizens and residents, constituted a termination of the interstate character so as to make the work in Ohio distinctly local in character. The parties could not by contractual relationship make a transaction one in interstate commerce when in fact it is on · involving local business.

Assuming that the sale of the tanks and boilers in its inception was a transaction in interstate commerce, the work at the moment of injury to the decedent was intrastate. The test which has been followed for a number of years has been laid down definitely and clearly by the United States Supreme Court in Shanks v. Delaware L. W. Ry. Co., 239 U. S. 556, where Justice Van Devanter used the following language:

> "The true test of employment in such commerce in the sense intended, is: Was the employer, at the time of the injury, engaged in interstate transportation or in work so closely related to it to be practically a part of it?"

In the year 1931-32, four important cases by this court indicated a clear tendency on the part of this court to place cases under local compensation acts in preference to the Federal act.

> Chicago & N. W. Ry. Co. v. Bolle, 284 U. S. 74.
> Chicago & Eastern Ry. Co. v. Indus. Comm. of Ill., 284 U. S. 296.
> N. Y., N. H. & R. R. v. Bezue, 284 U. S. 415.
> Boston-Maine Ry. Co. v. Armburg, 285 U. S. 234.

In the Armburg case Mr. Justice Stone, after holding that the injury took place in local commerce under the Massachusetts act, in spite of the fact that the railroad did a large interstate business, stated:

> "The interstate commerce clause did not withdraw from the state the power to legislate with respect to their local concerns even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it."

Thus, it must be concluded that even though the defendant engaged in interstate commerce transactions in conducting its regular business, nevertheless, in matters involving injuries to employes of the defendant, the local workmen's compensation act would be applicable providing the interstate character of the transaction terminated.

V.

NO CONFLICT OF LAWS EXISTS SINCE OHIO, THE STATE OF INJURY, GRANTED COMPENSATION UNDER ITS DISTINCTLY COMPULSORY SYSTEM.

The Industrial Commission of Ohio, in considering its jurisdictional power to hear and determine the application for death benefits made by the widow of the decedent in this case, undoubtedly relied upon the facts that William R. Tidwell was injured in the state of Ohio while engaged in the course of his employment and that such employment was performed for the defendant, an employer who had in his employ three or more persons in Ohio on the date of the injury.

There is no denial that a great many cases have arisen involving a conflict of laws in the matter of taking jurisdiction under the workmen's compensation acts. In Ohio, however, under a distinctly compulsory system, every employer who has in his employ three or more persons, is required to contribute to a state insurance fund. Therefore, under the Ohio act, if the commission

found that the defendant was an employer doing business in the state of Ohio and that it had three or more people in its employment, then the commission would be compelled to take jurisdiction of the widow's claim and to make the award which it did make in this case.

Under a distinctly compulsory system which creates a state insurance fund made up by all the employers and paid out for the benefit of all the employes entitled thereto under the terms of the act, compliance with the law of Tennessee could not be a defense and deny jurisdiction of Ohio to make an award.

In the following cases, the workmen's compensation law of the state of hiring was considered not to apply to injuries occurring outside of that state.

North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1 (Cal.).
Union Bridge & Const. Co. v. Ind. Comm., 287 Ill., 296 (Ill.).
Bement Oil Corp. v. Cubison, 84 Ind. App., 22, (Ind.).
Cogliano v. Ferguson, 228 Mass. 147 (Mass.).
Keyes-Davis Co. v. Alderdyce, 3 N. C. C. A. 639 (Mich.).
Boggs v. Standard Oil Co., 180 N. Y. Supp. 560 (N. Y.).
Altman v. N. D. Work. Comp. Bureau, 50 N. D. 215 (N. D.).

The above principle seems to control the decisions under the workmen's compensation acts of England and Canada.

Tomalin v. S. Pearson & Son, 2 K. B. 61 (Eng.).
Schwartz v. India Rubber, 2 K. B. 299 (Eng.).
Vincent v. La Cre de Fer, Quebec 45, C. S. 353 (Canada).

Inconvenience has often been urged as an argument against applying the law of the state where the injury occurred. Such an argument, however, must be considered in the light of the hardship and evils which will result. The Supreme Court of Arizona, in the case of Ocean Accident & Guarantee Corp. v. Indus. Comm. of Ariz., 257 Pac. 644, commenting upon this type of argument said:

> "It is contended that this construction will mean that employers operating in many states must inform themselves as to the workmen's compensation act of each state into which they send their employes, and that this would impose an intolerable burden on them. Such a burden, however, is no greater than that which would be imposed upon the Industrial Commission and the courts of this state in attempting to enforce the compensation acts of the places where the contract of employment was made. And the hardship which might be small indeed, compared to the very possible evil which might result from the contract view of the law. * * * If we accept the construction placed by the petitioner upon the law, it will be entirely possible for large employers of labor to select a state where the benefits of the compensation law are extremely small, and by making their contract of employment in that state, reduce to a great extent the benefits which the public policy of this state has declared should accrue to the injured workman. We do not think a construction making such a thing possible is one which should be adopted unless it is unavoidable. The rule which we have laid down will make benefits for injuries of the same kind arising under the same circumstances uniform and certain, and insure that all persons holding the status of employe within this state will be insured the protection of its beneficient laws."

The Arizona decision is based upon similar facts in that it involved a conflict between the state of hiring, namely, California, which had the elective type of compensation and the state of injury which operated under the compulsory type of workmen's compensation. To the same effect, note also the following cases.

Smith v. Heine Safety Boiler Co., 112 Atl. 516.
Doughwright v. Champlin, 100 Atl. 97.
Davidheiser v. Hay Foundry Wks., 94 Atl. 309.
Johnson v. Nelson, 150 N. W. 620.

It is further submitted that there is nothing inherently unfair or unjust nor against public policy to permit payment both in the state of hiring and in the state of injury. Writers on the subject of workmen's compensation legislation have indicated that the payments provided thereunder are in the nature of insurance and invariably are inadequate compared to the actual loss and impairment of earnings or wages. For instance, nearly all acts permit, in addition to an action for compensation, either directly from the employer or out of the state insurance fund, that the injured employe or his dependents may proceed against a third party for negligence in causing such an injury or wrongful death. Thus, the employe or his dependents are given two separate rights growing out of an industrial injury.

Such legislation indicates that there is no legal reason nor any violation of public policy when the happening of a single event gives rise to two separate causes of action. In King v. Viscoloid Co., 219 Mass. 420, an injury to an employe who was a minor gave rise to a

right of compensation to him and a right at common law for damages by the mother of that employe.

In Roundsville v. Central Ry. Co., 87 N. J. L. 371, the court stated:

> "Recovery of compensation in two states is no more illegal and is not necessarily more unjust than recovery upon two policies of life insurance."

The Supreme Court of Texas, commenting upon the public policy as affected by double recovery, in Texas Employers Ins. Assn. v. Price, 300 S. W. 667, said:

> "We think that insurance taken by an employer for the benefit of his employes against injuries from accidents under the compensation law of New Mexico, in addition to insurance under the Texas compensation law of this state, and to collect on each, is not contrary to any policy of this state or interstate comity as suggested by the applicant."

Assuming, therefore, that the widow of William R. Tidwell had certain rights under the compensation act of Tennessee, there is nothing in law, reason, or public policy to prevent Ohio, under its compulsory system of insurance, to take jurisdiction of whatever rights she had under the Ohio act.

The following conclusion is taken from an article entitled "Workmen's Compensation Law and Conflict of Law". Minnesota Law Review for March, 1927, at page 329.

> "There is a contractual right in the state of hiring by virtue of the existence of its separate compensation act and the existence of a policy of insurance taken out and paid for by the employer; there

> is a separate right in the state of injury by virtue of a distinct and different act compulsory in its nature defining a status and the rights and obligations of both the employer and the employe."

In Farr v. Babcock Lumber & Land Co., 109 S. E. 833 (N. C.) the Tennessee compensation law was considered not to affect the rights and liabilities growing out of an injury sustained by an employe who was injured in the state of North Carolina although the contract of employment was made in Tennessee. The Supreme Court of North Carolina held that the Tennessee compensation act did not interfere with the jurisdiction of North Carolina where the injury occurred, to entertain actions for the employer's failure to keep a physician at the camp to attend the employe after he was injured or for its employment of an incompetent physician or for its negligent failure to provide the injured employe transportation to his home.

The reasoning in the above cases compels the conclusion that the state of injury may take jurisdiction of claims for compensation even though similar rights may exist in the state where the contract of employment was made and that upon the granting of such an award in the state of injury there would be no violation of any principles of law, reason, or public policy.

VI.

THE WIDOW'S CLAIM WAS DENIED BY THE SUPREME COURT OF TENNESSEE SOLELY BY REASON OF OHIO TAKING JURISDICTION.

The widow in this case, realizing the existence of a possible conflict of laws between the states of Tennessee and Ohio and in order not to be barred by reason of statutory regulations, filed a claim in the state of Tennessee in addition to that filed in the state of Ohio, both claims being based upon the injury which caused her husband's death.

Such a claim had to be filed in the state of Tennessee within one year from the date of injury or death. The claim for compensation filed with the Industrial Commission of Ohio was allowed in accordance with the provisions of Section 1465-74, General Code of Ohio, the provisions of which are quoted earlier in this brief. The claim, however, which was asserted in the state of Tennessee was denied by the Supreme Court of that state solely by reason of a special defense set up by the employer, the defendant herein, that Ohio has already taken jurisdiction of the widow's rights.

This case is deemed of sufficient importance in reflecting the scope and effect of the workmen's compensation act of Tennessee that we have printed in full opinion of the Supreme Court of Tennessee and made it a part of

this brief. (See Appendix A, Tidwell v. Chattanooga Boiler & Tank Company.)

The Tennessee court in the Tidwell case, supra, proceeded upon the theory that the claim of the widow in the state of Tennessee is an action ex-contractu and that the terms of the workmen's compensation act of Tennessee became part of the contract of employment. The court concluded that a right of waiver exists and that there was a renunciation of the contract of employment. Therefore, we have a definite recognition of Ohio's jurisdiction over the widow's claim by the highest court of Tennessee. That court in affirming the decision of the court below, which denied the rights of the widow, said in its opinion:

> "Not prejudging another case but merely by way of answer to arguments made in this case we may observe that the defendant's way of escape from the Ohio proceedings and award is not apparent, after the pleading by the defendant of such proceedings and award to defeat its liability herein."

The above quotation is to be found at the very end of the opinion and plainly indicates that the defendant company successfully defended against the widow's claim in the state of Tennessee, basing its defense solely upon the fact that the state of Ohio has taken jurisdiction of this same claim. The syllabus of the above case is as follows:

> "Cora Tidwell v. Chattanooga Boiler & Tank Co., 163 Tenn., 420.
>
> 1. Workmen's compensation. Statutes. Compensation act is written into contract of employment.
>
> An action under the compensation act is an

action upon the contract of employment, into which all the terms of the compensation act are written by law.

2. Workmen's compensation. Contracts. Action in another state for compensation is renunciation of employment here.

Where a petition, having the right to proceed under our compensation act, instituted a proceeding and procured a recovery of compensation in the state in which an accident occurred, such action was a clear renunciation of the contract of employment made in this state, after which repudiation of the contract a proceeding cannot be maintained under our compensation act.

3. Election of remedies. Contracts. Party repudiating contract may not afterwards claim its benefits.

The obligations of a contract cannot be repudiated in one suit and benefits of that contract be claimed in a subsequent suit."

It would seem from the above that the defendant recognized the validity of Ohio jurisdiction since it successfully used that fact as a defense in the Tennessee courts. This amounts to an admission by the defendant that its liability for the death of William R. Tidwell was properly and legally before the Industrial Commission of Ohio for determination.

VII.

THE TENNESSEE ACT IS OPTIONAL OR ELECTIVE CREATING A CONTRACTUAL RELATIONSHIP BUT IS NOT EXCLUSIVE AS TO REMEDY IN PROCEEDING OUTSIDE OF THAT STATE.

The workmen's compensation act of Ohio has been sufficiently described by references to statutes and cases to indicate that it is a system of compensation based upon compulsory premium payments by every employer to maintain a state insurance fund controlled and operated by the state. By contrast, however, the Tennessee workmen's compensation act is optional or elective and subject to a contractual relationship where either party or both may agree to accept or reject the provisions of the act, and no general state fund exists.

The Supreme Court of Tennessee, in the case of Smith v. Van Noy Interstate Co., 262 S. W., 1048, discussed and defined the Tennessee act as being optional or elective and there are no compulsory features in the act insofar as the employer and employe are concerned. It further appears that where the parties accept the provisions of the Tennessee act, that awards for compensation and death benefits are paid either directly by the employer or by an insurance company which contracts with the employer to cover such risks.

In the case of Scott v. Bridge, 16 Thomp., 86, the Supreme Court of Tennessee stated:

> "Both the title and the body of the act expressly declare that the act is elective."

This essential difference between the Ohio and Tennessee acts materially affects the rights and remedies of the parties. For instance, the Iowa Supreme Court in Pierce v. Bekins Van & Storage Co., 172 N. W., 191, stated:

> "The fact that the statute is elective has controlling bearing on one thing that is highly important: namely, where the statute is elective as to both employer and employe, payment of compensation is not the performance of a statutory duty but the performance of the conditions in the contract of hiring, which conditions are in the contract by means of reading the compensation statute into the contract."

While the Tennessee act provides for exclusive remedies in enforcing violations of that act, such remedies are not exclusive when proceedings are brought by an employe outside of that state. In other words, the widow of William R. Tidwell in the claim filed in Tennessee was limited in her rights and remedies to those provided in the Tennessee act since the provisions of the Tennessee act are written in and become part of every contract of employment entered into in that state. However, it cannot be logically maintained that the widow could not avail herself of a different remedy when she brought separate proceedings in the state of the injury.

The Supreme Court of Tennessee in the Tidwell v.

Chattanooga Boiler and Tank Co. case, supra, seems to have concluded, in denying the rights of the widow in that state, that the rights and remedies provided in the Tennessee act are only applicable when such rights and remedies are sought in the courts of that state but that when proceedings are begun and rights adjudicated in the state of the injury, such proceedings amount to a disaffirmance and a waiver of all rights under the Tennessee law. This decision interprets the exclusive remedy statute found in the Tennessee act and is therefore controlling in the case at issue.

The conclusion is irresistible, therefore, that the Tennessee workmen's compensation law is only exclusive as to remedies that may be sought by the injured employe or his dependent in the state of Tennessee. This decision by the Supreme Court of Tennessee is consistent in that it affirms the jurisdictional power of Ohio to grant the award and to proceed against the employer as provided by the statutes of Ohio.

The Kansas compensation act apparently has an exclusive remedy provision which defines the remedies and the place where such remedies may be sought. In Harvis v. Cudahy Packing Company, 211 Mo. App., 188, it was held that there is no jurisdiction for suit outside of the state of contract where the workmen's compensation act has a provision that no action or proceeding provided for therein should be brought or maintained outside of the state of Kansas.

It is significant to note that the statute in the Tennessee act relating to remedies does not refer to actions

which may be brought outside of the state of contract, nor express any limitations thereto.

It would therefore seem, as was stated in American Radiator Co. v. Rogge, 86 N. J. L., 436, and Douthwright v. Champlin, 91 Conn., 524, that "if there is no contrary provision in the act, a workman may recover in a state in which he is injured under the workmen's compensation act of that state, although the employment was in another state."

Much consideration is given in this brief to the question whether the statutory provisions of the Tennessee act are exclusive as to remedies for the reason that it is a pivotal point in the following case: The Bradford Electric Lt. Co. v. Clapper, Admx., 286 U. S., 145, decided May 16, 1932, in which Mr. Justice Brandeis delivered the opinion of the court, Mr. Justice Stone wrote a concurring opinion, and Mr. Justice Cardozo took no part in the opinion or the decision of the case.

The facts in the Bradford case disclose that a contract of employment was entered into in the state of Vermont where the employer had its principal place of business and where the employe resided. The employe died of an injury which he sustained while engaged in his employers business in New Hampshire.

The Vermont compensation law has extra territorial application and contains statutory provisions as regards remedies. However, such provisions are exclusive and are strict limitations upon the rights of the injured employe or his dependents.

This court in holding that the employer's defense was

valid in a common law action in New Hampshire recognized that the employe and his dependents are bound by the exclusive remedy provision of the act which became part of the contract of employment. In other words, the decision of this court seems to be that there is no recovery in the state of injury in an action brought at common law if the act in the state of hiring provided definite and exclusive remedies for injuries sustained in the course of employment.

The Bradford case differs essentially from the instant case in the following respects:

1. In the Bradford case both the state of Vermont and the state of New Hampshire operated the elective or optional system of workmen's compensation, each recognizing a contractual relationship.

2. The court indicated that the New Hampshire law is only referable to residents of that state.

3. The employer in the Bradford case complied in both the state of hiring and in the state of injury.

4. In the Bradford case the dependent brought an action for damages at common law.

5. Under the workmen's compensation act of the state of Vermont, the employe and his dependents were bound by the exclusive remedy provisions of that law.

The instant case is distinguishable from the Bradford case in respect to every one of the above controlling facts. Indeed, Mr. Justice Brandeis recognized other elements which, if present in the Bradford case, would

have brought about a different decision. The very last words of the opinion are as follows:

> "We have no occasion to consider whether if the injured employe had been a resident of New Hampshire, or had been continuously employed there, or had left dependents there, recovery might validly have been permitted under New Hampshire law."

To the above conclusion this honorable court could logically have added that, if the compensation act of the state where the injury occurred is compulsory or, if there was a waiver or disaffirmance of the contract of employment or, if the remedy statute in the state of hiring was not exclusive, then recovery would be permitted by this court in the state of injury.

Mr. Justice Stone in a short concurring opinion stated the position of the petitioner in the instant case and also indicated that if different or additional facts had existed in the Bradford case, a holding to the opposite effect would have been proper. Justice Stone states on page 164:

> "It is true that in this case the status of employer and employe, terminable at will, was created by Vermont laws operating upon them while they were within that state. I assume that the fact of its creation there must be recognized elsewhere, whenever material. But I am not prepared to say that that status, voluntarily continued by employer and employe and given a locus in New Hampshire by their presence within the state, may not be regulated there according to New Hampshire law, or that the legal consequences of acts of the employer or employe there, which grow out of or affect the status in New Hampshire, must, by mandate of the Con-

stitution, be either defined or controlled, in the New Hampshire courts, by the laws of Vermont rather than of New Hampshire.

The interest, which New Hampshire has, in exercising that control derived from the presence of employer and employe within its borders, and the commission of the tortious act there, is at least as valid as that of Vermont, derived from the fact that the status is that of its citizens, and originated when they were in Vermont, before going to New Hampshire. I can find nothing in the history of the full faith and credit clause, or the decisions under it, which lends support to the view that it compels any state to subordinate its domestic policy, with respect to persons and their acts within its borders, to the laws of any other. On the contrary, I think it should be interpreted as leaving the courts of New Hampshire free, in the circumstances now presented, either to apply to refuse or refuse to apply the law of Vermont, in accordance with their own interpretation of New Hampshire policy and law."

It is therefore respectfully submitted that since the Supreme Court of Tennessee definitely decided in the Tidwell case, supra, that the Tennessee act is elective and the relationship is contractual, that the contract of employment may be waived or disaffirmed and that the remedy provided in the state of Tennessee related only to actions brought in that state, it follows that the remedy statute is not exclusive. The above conclusions, by the highest court of Tennessee distinguish and make the Bradford case not applicable.

VIII.

THE PETITIONER IS ENTITLED TO EQUITABLE CONTRIBUTION FROM THE DEFENDANT, THE AWARD HAVING BEEN PAID IN FULL OUT OF THE STATE INSURANCE FUND OF OHIO.

The decisions by the Supreme Court of Ohio, interpreting the provisions of Section 1465-74, make it a mandatory duty upon the Industrial Commission to pay to an injured employe or his dependents out of the state fund any award which has been adjudicated in favor of such employe or his dependents.

> "Payment from surplus fund ordered by mandamus where compensation was awarded widow of employe of noncomplying employer and where there was a judgment for the employer in an action by the attorney general to enforce the award. Compensation was not barred by widow's release to employer paying funeral expenses."
>
> State v. Indus. Com., 122 O. S., 509, 172 N. E. 364.

> "The last clause of G. C. Section 1465-74, requiring payment of an award against a noncomplying employer out of the surplus fund when the attorney general certifies that it cannot be collected from the employer, is clear, explicit and unambiguous; when such certification has been made, mandamus will lie to compel payment of the award. After such award has been made by the commission, the latter has no power, by virtue of its continuing jurisdiction under Section 1465-86, to vacate the award, unless there

was fraud or imposition practiced upon the commission in its procurement."

State v. Indus Com., 123 O. S., 164, 174 N. E. 345.

The above two cases hold that the award is payable out of the surplus fund regardless of the results to recoup the fund by a suit against the non-complying employer.

The award made in favor of the widow in this case, amounts to $4800.64 together with $110.00 as medical and funeral expenses. Under the Ohio act the widow receives 66-2/3 per cent. of the average weekly wage of her deceased husband, such weekly payments to continue for 416 weeks. The average weekly wage of the decedent was $17.31. The death benefits under the Tennessee act are provided for in Section 3608 a 181 (5), Tennessee Laws, and provide for 30 per cent. of the average weekly wage payable only during dependency and not exceeding a total of 400 weeks, which would make the maximum award $2076.00 plus $100.00 funeral expenses.

On the theory of an equitable contribution, it is respectfully urged that even if the state of Ohio exceeded her jurisdictional power in granting this award to the widow and since it is now paid in full, the defendant should therefore reimburse the petitioner to the extent of the amount the widow would have been entitled to receive under the provisions of the Tennessee act by reason of the death of her husband.

Any other conclusion would absolve the defendant from paying any part of an admitted liability and obli-

gation and leave the state of Ohio a total loser of nearly $5000.00. This principle of equitable contribution or equitable deduction in some instances has been definitely recognized by the courts of several states when dealing with a conflict under the provisions of the workmen's compensation act.

Thus, in Gilbert v. De Lauriers Column Mold Co., 180 App. Div. (N. Y.) 59, a claimant who was employed under a New York contract and was injured while performing services for his employer away from the plant of such an employer in the state of New Jersey, is under the protection of the New York statute rather than the New Jersey statute and the fact that the claimant was induced to invoke the New Jersey statute in the first instance, does not deprive him of his rights under the New York statute, and the insurance carrier is not aggrieved if credited with the amount it had paid under the provisions of the New Jersey act.

In the McLaughlins case, 274 Mass. 217, the amount of money received in New Hampshire by way of settlement between the insurer and the injured employe was applied as a credit in a subsequent award of compensation in the state of Massachusetts. The court said:

> "There is nothing in the statute which prevents the employer from recovering compensation here (Mass.) although he accepted money and gave the release (N. H.). The money received should be deducted from amount he is permitted to recover. But he retains the protection of the Massachusetts act, although he has given the release."

Now, then, if the state of Ohio had given effect to the death benefit provisions of the Tennessee act in determining the amount of the award, the defendant would have no cause to complain since the employer admits liability under the Tennessee law; furthermore, if the dependent had not filed her claim in Ohio, the Supreme Court of Tennessee would not have denied her claim and would have permitted the defendant to escape completely from paying any part of this claim.

Therefore, we respectfully urge this honorable court that since the state of Ohio paid to the widow of William R. Tidwell an obligation which should have been paid by the Chattanooga Boiler and Tank Company, in accordance with the principles of equity and good conscience the defendant should reimburse the state of Ohio in the amount which the employer would have been justly compelled to pay if Ohio had not taken jurisdiction of the widow's rights.

CONCLUSION.

The Industrial Commission of Ohio had the authority to hear and determine the claim of the widow and to make the award in her favor and against the employer, it having been shown to this honorable court that:

The state of Ohio under a valid exercise of the police power enacted a compulsory system of workmen's compensation under which a status is created for both the employer and the employe regardless of citizenship or legal residence.

Every employer of three or more persons who fails to pay his share of premiums into the state insurance fund becomes liable for any awards determined by the Industrial Commission in favor of such employe, injured workman or his dependents.

The defendant corporation, engaged in doing business in Ohio and employing eight persons at the time when William R. Tidwell, one of the employes, sustained a fatal injury in the course of his employment in Ohio, refused to comply with the Ohio workmen's compensation law.

The claim of the widow was denied by the courts of Tennessee. The Supreme Court of that state recognizing Ohio jurisdiction as a special defense, held the widow had a right to waive or disaffirm the terms of the contract of employment and that her remedies were not exclusively confined to the state of Tennessee.

The state of Ohio has paid to the widow a just obligation of the defendant and in equity and good conscience is entitled to judgment upon the award duly determined by the Industrial Commission of Ohio or for such an amount as the court deems fair and reasonable.

Respectfully submitted,

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PROOF OF SERVICE.

We hereby acknowledge receipt of copy of brief on behalf of plaintiff the state of Ohio, this tenth day of March, 1933.

HARRY B. ARNOLD,
Counsel for Defendant.
FRANCIS J. WRIGHT,
Of Counsel.

APPENDIX A.

163 Tennessee, 420.

Cora A. Tidwell v. Chattanooga Boiler & Tank Company.

Appeal from the Circuit Court of Hamilton county, Hon. L. D. Miller, J.

Lynch, Bachman, Phillips & Lynch, for plaintiff in error.

Rankin, Frazier & Roberts, for defendant in error.

Mr. Chief Justice Green delivered the opinion of the court.

This is a suit under chapter 123 of the Acts of 1919, by the widow of an employe of defendant. The suit was dismissed and the petitioner has appealed.

There is no question but that petitioner's husband met his death in an accident arising out of and in the course of his employment. The defendant's principal office is in Chattanooga, Tennessee, but it often sells its manufactured products in other states. Defendant had sold and agreed to install a boiler in Ironton, Ohio, and petitioner's husband, with other employes of defendant, was sent to this place in connection with the work of installation. The husband met his death in an accident occurring while on this job in the state of Ohio. His contract with defendant contemplated that he would be sent out of the state when occasion required, on jobs like this.

After her husband's death the petitioner herin began proceedings in Ohio against the defendant under the

workmen's compensation laws of that state, Sections 1465 et seq., of the General Code of Ohio. She obtained an award of $4800.64 from the Industrial Commission of Ohio on account of his death—$11.54 per week for 416 weeks. At the time of the trial below she had received from this source $1927.18 and it was stipulated herein that she would continue to receive said weekly payments until the award was satisfied.

The defendant received notice from the Industrial Commission of Ohio respecting the petitioner's claim there. Defendant ignored this notice, its position seeming to be that it had not qualified to do business in Ohio, had not complied with the compensation laws of that state, and was not amenable to said laws. After the award was made in favor of the petitioner the Ohio Industrial Commission called on the defendant to satisfy the same, which defendant has refused to do. The state of Ohio, however, has created an insurance fund and under its statutes the state acts as an insurer of the payment of compensation duly awarded, and the state, therefore, has made the payments to petitioner above mentioned and become responsible for payment of further installments of her compensation.

To recover its outlay and to secure its liability on this account, the state of Ohio appears to have brought one suit against the defendant for the use of this petitioner in the Federal District Court at Chatanooga. That court, however, held the petitioner was the real party plaintiff and there was no diversity of citizenship to sustain the jurisdiction.

In the present suit, the widow seeking the compensation which ordinarily she would be entitled to under the Tennessee statute, the sole defense interposed is the proceedings in Ohio. Such proceedings out of the way, there would be no defense on the record before us. We agree, however, with the trial judge that the defense made was good.

(1) The recovery here sought is a benefit the widow would be entitled to, if at all, as under the contract of employment between her husband and defendant. This is a suit upon contract. All the terms of chapter 123 of the acts of 1919 were written by law into that contract. Coal & Coke Co. v. Martin, 155 Tenn., 34; Leonard v. Cranberry Furnace Co., 150 Tenn., 346; Poore v. Bowlin, 150 Tenn., 412; Smith v. VanNoy Interstate Co., 150 Tenn., 25; Western Union Telegraph Co. v. Ausbrooks, 148 Tenn., 615.

(2) Section 19 of our compensation act is as follows:

> "That when an accident happens while the employe is elsewhere than in this state, which would entitle him or his dependents to compensation had it happened in this state, the employe or his dependents shall be entitled to compensation under this act if the contract of employment was made in this state, unless otherwise expressly provided by said contract."

Section 8 is in these words:

> "That the rights and remedies herein granted to an employe subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employe, his personal representative, dependents or next of kin, at com-

mon law or otherwise, on account of such injury or death."

Section 2 (b) contains this:

"Any reference herein to an employe who has been injured shall, when the employe is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable under this act."

See in this connection McCreary v. Nashville C. & St. L. Ry., 161 Tenn., 691.

The employment contract therefore, by force of Section 8 quoted, provided that the remedies thereby granted to this petitioner should exclude all her other rights and remedies, at common law or otherwise, on account of her husband's death. By force of Section 19 of the contract of employment covered this accident which occurred in the state of Ohio. See Smith v. VanNoy Interstate Co., supra. Accordingly, when petitioner instituted the proceedings in Ohio to recover compensation for her husband's death, this was a clear renunciation or disaffirmance of the contract.

(3) The obligations of the contract cannot be repudiated in one suit and benefits of that contract be claimed in a subsequent suit. O'Bryan v. Glenn, 91 Tenn., 106; Montlake Coal Co. v. Chattanooga Co., 137 Tenn., 440; Grizzard v. Fite, 137 Tenn., 103; and cases therein reviewed. There can be no question but that the election thus made was irrevocable because petitioner has taken the benefit of the Ohio suit and defendant will doubtless take the detriment of that suit.

Cases from other jurisdictions brought to our attention by counsel for petitioner are not apt. It does not appear that compensation statutes in those states contain provisions similar to Section 8 of our statute above set out and Section 14, and other provisions of our statute that might be mentioned.

It is argued that since the defendant has paid nothing on account of the Ohio award and is not admitting liability thereupon, it is in no position to raise this question of election or estoppel. Petitioner, however, has received the benefit of that award from defendant's insurer, the state of Ohio, and thus put her election beyond revocation under all authorities. She is not concerned with the controversy between defendant and its insurer.

Not prejudging another case, but merely by way of answer to argument made in this case, we may observe that defendant's way of escape from the Ohio proceedings and award is not apparent, after the pleading by the defendant of such proceedings and award to defeat its liability herein.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 18—Original at Law.

THE STATE OF OHIO,

Plaintiff,

vs.

THE CHATTANOOGA BOILER AND TANK COMPANY, A TENNESSEE CORPORATION, CHATTANOOGA, TENNESSEE,

Defendant.

BRIEF ON BEHALF OF DEFENDANT.

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Defendant.

BRIEF ON BEHALF OF DEFENDANT.

STATEMENT OF FACTS.

We desire to direct attention briefly to certain facts which were omitted in the statement of the case by counsel for plaintiff.

Substantially all business of the defendant was transacted in the state of Tennessee where its plant for the

construction and manufacture of boilers and tanks was situated. These boilers and tanks were sold by the defendant to purchasers in Tennessee and other states.

The defendant has never had any office or place of business in the state of Ohio.

About September 2, 1926, defendant entered into a contract of employment in Chattanooga, Tennessee, with one William R. Tidwell. This contract provided and contemplated that the services to be performed by Tidwell were to be performed in the state of Tennessee and in other states when the installation of tanks and boilers became necessary. Tidwell was a rivet-heater. He was a citizen and resident of the state of Tennessee. After his death his widow became a resident and citizen of the state of Georgia.

Both the defendant and Tidwell had accepted the Workmen's Compensation Act of the state of Tennessee.

The Tennessee Act provides an elective system of workmen's compensation for industrial accidents. The preamble to the act recites that its purpose, among others, is,

> "to define and regulate the liability of employers to employees for injuries sustained by such employees in the course of their employment resulting in disability or death; * * * to prescribe a method for the execution of this act for the determination of liability of employers to employees for compensation, and to regulate the procedure in such cases;"

Section 2(b) of the act provides that,

> "Any reference herein to employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents or other persons to whom compensation may be payable under this act."

Section 3 of the act is as follows:

"That from and after the taking effect of this act, every employer and every employee, except as herein stated, shall be presumed to have accepted the provisions of this act, respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided."

Section 8 of the act is as follows:

"That the rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death."

Section 11 of the act is as follows:

"That every employer who elects not to operate under this act as herein provided shall not, in any suit brought against him by an employee, who has elected to operate under the provisions of this act, to recover damages for personal injury or death arising from accident, be permitted to defend such suit upon any of the following grounds, namely:

(a) That the employee was negligent.

(b) That the injury was caused by the negligence of a fellow-servant or fellow-employee.

(c) That the employee had assumed the risk of the injury."

Section 14 of the act provides:

"That whenever an injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person

than the employer a legal liability to pay damages in respect thereto, the injured employee may at his option either claim compensation or proceed at law against such other person to recover damages, or proceed against both the employer and such other person, but he shall not be entitled to collect from both; and if compensation is awarded under this act the employer having paid the compensation or having become liable therefor, may collect, in his own name or in the name of the injured employee in a suit brought for the purpose, from the other person in whom legal liability for damages exists, the indemnity paid or payable to the injured employee."

Section 19 of the act provides:

"That when an accident happens while the employee is elsewhere than in this state, which would entitle him or his dependents to compensation had it happened in this state, the employee or his dependents shall be entitled to compensation under this act if the contract of employment was made in this state, unless otherwise expressly provided by said contract."

The contract for the sale of the tanks sold by the defendant to Ironton By-Products Coke Company of Ironton, Ohio, required the defendant to install and erect the tanks at the purchaser's plant in Ironton, Ohio.

The defendant did not comply with the Workmen's Compensation Act of Ohio either by becoming a subscriber to the state insurance fund or by electing to pay compensation direct to injured employees or to their dependents in case of death.

About five months after Tidwell's death his widow filed her application with the Industrial Commission of Ohio for compensation on the theory that the Ohio act was applicable.

The Ohio act makes more liberal provision in death cases than does the Tennessee act. Under the circumstances of this case the former allowed $4910.64, while the latter would have allowed approximately $2200.00.

Seven months later Mrs. Tidwell filed her application with the Tennessee commission for compensation under the Tennessee act. She also filed suit in the Circuit Court of Hamilton county at Chattanooga, Tennessee. In June, 1929, the Industrial Commission of Ohio made an award to Mrs. Tidwell in the total sum of $4910.64. The Ohio commission found that the defendant was an employer, as respects Tidwell, within the meaning of the Ohio Act and made an order directing it to pay the above amount to the Industrial Commission of Ohio. This the defendant has refused to do on the ground that the Ohio commission had no jurisdiction, power or authority to make an award which, under the circumstances of this case, was binding upon it.

The Ohio commission nevertheless paid the award to Mrs. Tidwell and this fact was certified to the attorney general of Ohio with instructions to institute suit against the defendant for reimbursement as provided by Section 1465-74 of the General Code of Ohio. Since the defendant had no officer or agent in Ohio upon whom summons could be served, no action could be brought there. An action was, however, begun by plaintiff in the United States District Court for the Eastern District of Tennessee, Southern Division, but that court dismissed the action for want of jurisdiction,—there being no diversity of citizenship.

brought the action, was a citizen and resident of New Hampshire. The action was brought in New Hampshire under the employers' liability part of the New Hampshire act. The defense of the employer there, as here, was that the rights of the parties were controlled by the laws of the state of the employment and of their residence.

1. The first distinguishing feature suggested by our opponents is that both the Vermont act and the New Hampshire act are elective, whereas here only the Tennessee act is elective,—the Ohio act being compulsory. It is argued that the elective system of workmen's compensation, when accepted by the employer and employee, creates a *contractural relationship*, whereas the compulsory system establishes a *status* between the employer and employee; that this difference is vital and renders the Clapper case valueless as a precedent for this case.

The cases in which this difference in the systems was first observed were those in which the constitutionality of the acts was challenged. The acts providing for elective systems were universally held to be constitutional, while in some instances the compulsory acts, notably the first New York Workmen's Compensation Act, were declared unconstitutional. Both types have been sustained as being a valid exercise of the state's police powers. Since that time this difference has been commented upon from time to time by the courts but usually in connection with a discussion of the extraterritorial effect of such acts. The author of the note in 3 A. L. R., 1351, summarizes the situation with this statement:

> "Compensation statutes may be divided into two general classes; those which are compulsory and those

> which are elective; but this fundamental distinction does not afford any guide in determining whether or not the statutes are to be considered as applying to injuries occurring outside of the state, since statutes of both classes have been construed to apply and not to apply to such injuries."

The Ohio act has been held to operate extraterritorially. Industrial Commission v. Gardinio, 119 O. S., 539, 164 N. E., 758. So has the Tennessee Act. Smith v. Van Nuy Interstate Co., 262 S. W., 1048.

Other differences between the Ohio act and the Tennessee act are of no consequence in determining the questions here presented. Failure to comply with the Ohio act exposes the employer to a common law action of negligence in which the defenses of fellow servant rule, assumption of risk or the defense of contributory negligence may not be interposed. Sec. 1465-73, General Code of Ohio. In addition to this the employee may apply to the Ohio commission and receive an award as though the employer had complied (Sec. 1465-74, General Code of Ohio), but the employer may resist the collection of the award by the commission in an action against him. State, ex rel., Kilgore v. Industrial Commission of Ohio, 123 O. S., 164; 174 N. E., 345. Likewise, under the Tennessee act the failure of the employer to accept the act deprives him of the defenses of assumption of risk, fellow servant's fault and contributory negligence. Sec. 11 of Chapter 123 of Acts of 1919, as amended by Chapter 84, Laws of 1923, and Chapter 40, Acts of 1927. Scott v. Nashville Bridge Co., 223 S. W., 844.

The election made by the administratrix in the Clapper

case was to sue in tort for damages. The same election was open to Mrs. Tidwell under the Ohio statute.

This court said in the Clapper case (page 157-8):

> "Workmen's compensation acts are treated almost universally as creating a *statutory relationship* between the parties." (Italics ours.)

But whether the relationship between the employer and employee be termed "contractual" or "statutory" or a "status," the fundamental purpose of both systems is identical.

Certainly the full faith and credit which the Federal Constitution requires Ohio to give to the public acts of Tennessee cannot be made to depend upon whether Ohio's act is compulsory or elective. No sound reason can be urged why, on this point, a different conclusion should be reached in this case from that reached in the Clapper case.

Opposing counsel suggest that had the New Hampshire act been a compulsory one the opposite conclusion would have been reached by this Court. We find nothing in the opinion to justify this assertion.

2. The second distinguishing feature suggested is that the Court indicated that the New Hampshire Act was only referable to residents of that state. We find no such indication in the opinion, but even if this were so, as much could be said of the Ohio act. Industrial Commission of Ohio v. Gardinio, *supra;* Industrial Commission v. Ware, 10 Ohio App., 375. This being true the Ohio Commission had no jurisdiction, power or authority to make the award it did. But even if the Ohio act were broader in this respect than the New Hampshire act it does not follow

that the protection given the defendant by the Tennessee act may be disregarded. The constitutional guarantee is as sacred in the one case as in the other.

The portion of the opinion to which opposing counsel doubtless refer, on this point, is found on pages 161-2. The court was here discussing the objection that to deny recovery would be obnoxious to the public policy of New Hampshire. In another part of their brief our opponents make the same argument. As an answer we may adapt the language on pages 161-2 of the opinion to the facts of this case.

> Moreover, there is no adequate basis for the conclusion that to deny recovery would be obnoxious to the public policy of Ohio. No decision of the state court has been cited indicating that recognition of the Tennessee statute would be regarded in Ohio as prejudicial to the interests of its citizens. In support of the contention that the provision of the Tennessee act is contrary to the Ohio policy, it is urged that Ohio's compensation law is a compulsory one which requires the employer to comply with it or be exposed to a common law action of negligence in which certain defenses are not available to him or to be liable for the payment of an award made by the Industrial Commission of Ohio on account of injury to or death of an employee. But the mere fact that the Tennessee legislation does not conform to that of Ohio does not establish that it would be obnoxious to the latter's public policy to give effect to the Tennessee statute in cases involving only the rights of residents of that state incident to the relation of employer or employee created there. Northern P. R. Co. v. Babcock, 154 U. S., 190, 198, 38 L. Ed., 958, 960, 14 S. Ct., 978. Nor does sufficient reason appear why it should be so regarded. The interest of Ohio was only casual. William Tidwell was not a resident there. He was not continuously employed there. He had no dependent

there. It is difficult to see how the state's interest would be subserved, under such circumstances, by burdening its courts with this litigation, or Ohio employers with increased premiums to the state insurance fund.

3. The third point of difference suggested by our opponents is that the employer in the Clapper case complied with the New Hampshire act, whereas the defendant in this case did not comply with the Ohio act. How this difference helps the plaintiff we are at a loss to understand. Indeed it was this fact that was most strongly urged by the administratrix in the Clapper case as the reason why the New Hampshire act applied and the Vermont act did not. It was this fact that led the Court of Appeals to sustain the judgment for the administratrix. The compliance with the New Hampshire act by the employer in the Clapper case carried with it an implication or implied acknowledgement that the New Hampshire act did apply, which is wholly lacking in this case.

There can be no question but that as to the Ohio workmen who were employed in Ohio the Ohio act did apply and had one of these been injured or killed the defendant would have paid the award made by the Ohio commission.

Mr. Justice Brandeis pointed out (page 162), that:

> "The circumstances under which the acceptance of the New Hampshire act was filed show that the company did not intend thereby to abandon its rights under the Vermont law in respect to Leon Clapper or other employees similarly situated."

It may here more appropriately be said that the failure of the defendant to comply with the Ohio act is not a cir-

cumstance showing that it intended to abandon its rights under the Tennessee act in respect to William Tidwell and the three other Tennessee workmen.

In this connection Mr. Justice Brandeis also said (page 163):

> "Its acceptance is to be construed as referable only to such New Hampshire employees and not as bringing under the New Hampshire act employees not otherwise subject to it."

Likewise it may be said that the provisions of the Ohio act, even when accepted, are to be construed as referable only to the Ohio employees and not as bringing under the Ohio act employees not otherwise subject to it.

4. The fourth distinguishing feature observed by opposing counsel is that the action in New Hampshire was an action for damages at common law rather than an action under the New Hampshire act. The opinion in the Clapper case (page 150), begins with this statement:

> "This action for damages was brought in a court of New Hampshire under the employers liability provisions of the Employers' Liability and Workmen's Compensation Act of that state, N. H. Public Laws, 1926, Chapter 302, to recover for the death of Leon J. Clapper, which the plaintiff claimed was due to his employer's negligence."

It is plain that the action taken in that case was authorized by the New Hampshire act. Likewise the action taken by Mrs. Tidwell in Ohio was authorized by the Ohio act and this action is brought also under authority of said act, Sec. 1465-74, General Code of Ohio. In the one case the tribunal through which relief was sought was the New

Hampshire court, while in the other it was through the Ohio Industrial Commission which was, in a sense, substituted for the court. All this, however, has to do with the remedy by which the rights and obligations of the parties are determined and not with the substantive rights of the parties with which we are here concerned. The action for damages in New Hampshire was as important to Mrs. Clapper as the proceedings before the Industrial Commission of Ohio were to Mrs. Tidwell. If the former did not afford a sufficient basis for permitting recovery no reason can be suggested why the latter should. Moreover, if the defendant could have been sued in Ohio and if Mrs. Tidwell had elected to bring suit against it there, as she might have, the two cases would have been identical in this respect. Certainly such procedural differences cannot operate to make the obligation of the defendant in this case greater than that of the defendant in the Clapper case.

5. The fifth point of difference suggested by opposing counsel is that under the Vermont act the employee and his dependents were bound by the exclusive remedy provisions of that law.

It is submitted that the provisions of the Tennessee act are no less broad in this respect than those of the Vermont act. The preamble of the act explicitly states that the purpose of the act is to "define and regulate the liability of employer to employee" and to prescribe a method for the "determination of liability of employer to employee."

Section 3 of the act provides:

> "That from and after the taking effect of this act, every employer and every employee, except as herein

stated, shall be presumed to have accepted the provision of this act, respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and *shall be bound thereby*, unless he shall have given prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided." (Italics ours.)

Section 8 provides:

"That the *rights* and *remedies* herein granted to an employee subject to this act on account of personal injury or death by accident *shall exclude all other rights and remedies* of such employee, his personal representative, dependents or next of kin, at common law *or otherwise*, on account of such injury or death." (Italics ours.)

Section 14 provides:

"That whenever an injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may at his *option* either claim compensation or proceed at law against such other person to recover damages, or proceed against both the employer and such other person, *but he shall not be entitled to collect from both;* and if compensation is awarded under this act the employer having paid the compensation or having become liable therefor, may collect, in his own name or in the name of the injured employee in a suit brought for the purpose, from the other person in whom legal liability for damages exists, the indemnity paid or payable to the injured employee." (Italics ours.)

Section 19 provides:

"That when an accident happens while the employee is elsewhere than in this state, which would entitle

> him or his dependents to compensation had it happened in this state, the employee or his dependents shall be entitled to compensation under this act if the contract of employment was made in this state, unless otherwise expressly provided by said contract."

These sections are in pari materia and must be construed together. So construing them, it is clear that the purpose of the act is to define, regulate and determine the liability of employer to employee; that, having accepted the act they are bound thereby; the rights and remedies therein granted are exclusive of all other rights and remedies at common law or otherwise; that even as against third persons only one recovery may be had on account of one injury, and the provisions of the act apply to injuries or death occurring without as well as within Tennessee.

Again adopting the language of the opinion in the Clapper case (page 153):

> It clearly was the purpose of the Tennessee act to preclude any recovery by proceedings at common law or otherwise brought in another state for injuries received in the course of a Tennessee employment. The provisions of the act leave no room for construction. The statute declares in substance that when a workman is hired within the state, he shall be entitled to compensation thereunder for injuries received outside, as well as inside, the state, unless one of the parties elects to reject the provisions of the act. And it declares further that for such injuries the remedy under the statute shall exclude all other rights and remedies of the employee or his personal representative. If the accident had happened in Tennessee, the statute plainly would have precluded the bringing of an action for damages or otherwise. * * * The question is whether the fact that the injury occurred in Ohio leaves its Industrial Commission or its courts, or both,

> free to subject the employer to liability in tort or otherwise. That is, may the Industrial Commission of Ohio or the courts of Ohio disregard the relative rights of the parties as determined by the laws of Tennessee where they resided and made the contract of employment; or must they give effect to the Tennessee act, and to the agreement implied therefrom, that the only right of the employee against the employer, in case of injury, shall be the claim for compensation provided by the statute?

Further adapting the language of the opinion in respect to the giving, by Ohio, of full faith and credit to the public acts of Tennessee, as required by Art. 4, Sec. 1 of the Federal Constitution (page 156):

> But, obviously, the power of Tennessee to effect legal consequences by legislation is not limited strictly to occurrences within its boundaries. It has power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders * * * and likewise has power to exclude from its own courts proceedings for any other form of relief for such injuries. (157.) The existence of this power is not denied. * * * Workmen's Compensation Acts are (page 158) treated, almost universally, as creating a stautory relation, between the parties, * * *. The relation between William Tidwell and the company was created by the law of Tennessee; and as long as that relation persisted its incidents were properly subject to regulation there. For both Tidwell and the company were at all times residents of Tennessee; the company's principal place of business was located there; the contract of employment was made there; and the employee's duties required him to go into Ohio only for a temporary and specific purpose, in response to orders given him at the Tennessee office. The mere recognition by the tribunals of one state that parties by their conduct have subjected themselves to certain obligations aris-

ing under the laws of another state is not to be deemed an extraterritorial application of the law of the state creating the obligation. (Page 159.)

By requiring that, under the circumstances here presented, full faith and credit be given to the public act of Tennessee, the Federal Constitution forbids the employee or his representative from asserting in Ohio rights which were denied him by the Tennessee act. A Tennessee court could have enjoined William Tidwell from suing the company in Ohio or from pressing his application for an award from the Industrial Commission of Ohio, thereby subjecting his employer to a claim for the amount of the award, just as it would have denied him such rights in Tennessee. * * * The rights created by the Tennessee act were entitled to like protection in Ohio and are entitled to like protection when set up by way of defense here. If this were not so, and the employee or his representative or the plaintiff were free to disregard the law of Tennessee and his contract, the effectiveness of the Tennessee act would be grossly impaired. For the purpose of that act, as of the Workmen's Compensation Laws of most other states, is to provide, in respect to persons residing and businesses located in the state, not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.

It follows that there is no such difference in the circumstances of the two cases as would warrant one rule in the Clapper case and an opposite rule in this case.

This, however, should be added. If the state of Ohio in its beneficence had undertaken to throw a protecting arm over the citizens of other states who might temporarily be within Ohio, by the allowance of compensation out of its state insurance fund, we suppose other citizens of such

states could not be heard to complain, so long as the state of Ohio, in so doing, did not attempt to penalize them by increasing the obligations fixed by the laws of such other states. However, we find nothing in the Ohio act which suggests that the burden to citizens of Ohio, which would thus result, was intended. The courts of Ohio have placed no such construction upon either its constitutional or statutory provisions on this subject. On the contrary, the decisions of the Ohio courts strongly indicate that the state insurance fund of Ohio is to be administered for the benefit of the citizens and residents of the state of Ohio. Industrial Commission v. Gardinio, *supra*, and Industrial Commission v. Ware, *supra*.

II.

Discussion of Tidwell v. Chattanooga Boiler & Tank Co., 163 Tenn., 420, 43 S. W. (2), 22.

It is argued that the fact that Mrs. Tidwell was denied recovery by the Supreme Court of Tennessee in the action brought in that state to recover under the provisions of the Tennessee act, and that the defendant was thereby relieved from paying under the Tennessee act, furnishes sufficient grounds for recovery by the plaintiff in this action. The history of the attempts by Mrs. Tidwell and the plaintiff to subject the defendant to payment of benefits totaling $7100, under both the Ohio and Tennessee acts, is ample justification for the defendant's action in contesting the right of Mrs. Tidwell to recover in the proceeding brought in Tennessee and the right of plaintiff to recover here.

The defendant properly insisted from the beginning that its liability was fixed and controlled by the Tennessee act. Mrs. Tidwell, however, first made claim with the Industrial Commission of Ohio, more than seven months before claim was filed under the Tennessee act. Although the defendant took the position that the Ohio commission had no jurisdiction, power or authority to make an award under the circumstances of the case which would be binding upon it, it could not be sure that its position would be upheld by the courts. It therefore was entirely within its rights in resisting payment under the Tennessee act because of the possibility of being obliged to pay the amount of the award made by the Ohio Commission which was being asserted by the state of Ohio and which resulted in the filing of a suit by the latter against the defendant in the United States District Court for the Eastern District of Tennessee, Southern Division.

The fact that the Supreme Court of Tennessee has since held that defendant was not liable under the Tennessee act does not operate to create a liability which did not theretofore exist.

Had the Ohio Commission declined to entertain the claim filed by Mrs. Tidwell on the ground that it had no jurisdiction and on the further ground that her rights were fixed by the Tennessee Act, neither this litigation nor the litigation in Tennessee would have been necessary.

There need be no confusion about the relationships of these parties and all this litigation. There is not now and there never has been any contractual or other relationship between the defendant and the plaintiff or its

tribunal known as the Industrial Commission of Ohio. It cannot properly be said that there is any privity between them. The plaintiff here was in no sense a party to, and had no interest in the outcome of, the action in Tennessee. That action was brought by Mrs. Tidwell on her own behalf and the plaintiff here would obviously have had no interest in any judgment which she might have obtained. Mrs. Tidwell is, of course, not a party to this action and has no interest whatever in the outcome. She has no rights here which may be affected and no interests which might in the slightest be prejudiced.

The defense here, therefore, cannot be made to depend upon the result of Mrs. Tidwell's action in Tennessee.

More especially is this true because the defendant's maximum liability under the Tennessee act was $2200, whereas the amount claimed by the state of Ohio is $4910.64. The fact that the defendant may be relieved from liability under both acts is a situation which has been brought about,—not by the defendant, which was willing to pay the amount required by the Tennessee act if it could have done so without further liability,—but by the acts of Mrs. Tidwell, on the one hand, in filing claims under both acts, and by the state of Ohio, on the other hand, in erroneously assuming jurisdiction and making an award under the Ohio act. It would be manifestly unjust and unfair thus to penalize the defendant for having pursued the only course which it could reasonably have been expected to take under the circumstances.

It is argued that the Supreme Court of Tennessee found that the Ohio commission had jurisdiction and that its

award to Mrs. Tidwell was proper. The decision in that case is not fairly susceptible of this interpretation. The court was not required to pass upon the jurisdiction of the Ohio commission. The *ratio decidendi* of the decision is that Mrs. Tidwell, by making application to the Ohio commission, renounced the contract under the Tennessee act and therefore was not entitled to any benefits thereunder.

The remarks made in the concluding paragraph of the opinion disclose some curiosity as to what the outcome of this action may be, but the court could not, of course, have given consideration to the questions here presented and frankly stated that it was not attempting to prejudge these questions.

III.

Equitable Contribution.

The argument of our opponents under this heading is significant. But the equities as well as the law are against them.

The defendant has never sought to avoid its just obligation in respect to Tidwell's death. It would willingly have paid the amount required under the Tennessee act if it could have done so without the risk of having to pay again. Mrs. Tidwell first made claim for an award under the Ohio act. The Ohio commission notified defendant of the filing of this claim and that it would look to defendant for payment if an award was made. Notwithstanding that she had been granted an award by the Ohio commission,

she pursued her claim against the defendant under the Tennessee act. The defendant has been subjected to litigation at the instance of the plaintiff and Mrs. Tidwell in several jurisdictions which have involved a maximum liability on its part of $7100.00. It could not, without subjecting itself to at least double liability, pay the amount required under the Tennessee act as long as Mrs. Tidwell was insisting upon her claim made with the Ohio Commission and as long as that commission was endeavoring to collect the amount of its award. The plaintiff has no equity on its side. By accepting jurisdiction of Mrs. Tidwell's claim and paying the award, plaintiff has compelled the defendant to resort to a defense of its rights in several jurisdictions at considerable expense.

Furthermore, this action is concededly brought by the plaintiff under Section 1465-74 of the General Code of Ohio, which only authorizes such action for recovery of the award made by the Industrial Commission of Ohio. An action for equitable contribution is nowhere authorized by the statutes of Ohio. The petition herein makes no claim for equitable contribution but is based solely upon the right of the plaintiff to maintain this action at law, under Section 1465-74 of the General Code of Ohio.

All of the cases cited by our opponents which have a direct bearing upon the precise question here involved were called to the attention of this court by briefs filed in the Clapper case. We therefore deem it unnecessary to enter into a discussion of them.

CONCLUSION.

We believe the decision in the Clapper case is decisive of this case. The fact that there has been some judicial recognition of a difference between workmen's compensation acts which are elective and those which are compulsory is of no importance in this case. The constitutional requirement of full faith and credit is not in the least affected by any supposed difference in the two systems.

The decision of the Supreme Court of Tennessee in the action brought by Mrs. Tidwell under the Tennessee act has no bearing upon the issues here involved.

If plaintiff were permitted to recover in this action the defendant would be penalized in the sum of $2710.64, being the difference between the amount allowed by the Tennessee act and the amount of the award made by the Ohio commission.

There is no basis for the application of the doctrine of equitable contribution. The equities are with the defendant rather than with the plaintiff. The former was willing to pay the benefits provided in the Tennessee act whereas the latter, by erroneously assuming jurisdiction and making the award and by its persistent efforts in litigation thereafter to collect from the former the amount of the award so made, has caused the defendant great inconvenience and substantial expense.

It is respectfully submitted that the petition should be dismissed at the costs of the plaintiff.

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 18, Original.—October Term, 1932.

The State of Ohio,
vs.
The Chattanooga Boiler and Tank Company.

[May 22, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

The State of Ohio invokes, by an action at law, the original jurisdiction of this Court to recover the sum of $4,910.64 from the Chattanooga Boiler and Tank Company, a corporation organized in Tennessee and having its principal place of business there. Reimbursement is sought by the State of the amount paid from its insurance fund to Mrs. Cora Tidwell, as compensation for the death of her husband, an employee of the company, who was killed at Ironton, Ohio, while engaged in erecting a tank. The claim rests upon the Workmen's Compensation Act of Ohio, section 1465-37-110 of the General Code,—a law of the compulsory type held constitutional in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219.

The proceeding at bar is one to enforce a statutory cause of action for liquidated damages, based on an award made to Mrs. Tidwell by the Industrial Commission.[1] The employer relies, as its only defense, upon the full faith and credit clause, invoking the rule declared in *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145. That defense was not set up in the proceedings before the

[1] "Any employee whose employer has failed to comply with the provisions of section 1465-69, who has been injured or has suffered an occupational disease in the course of his employment, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceedings against his employer by civil action in the courts, as provided in section 1465-73, file his application with the commission for compensation and the commission shall hear and determine such application for compensation in like manner as in other claims and shall make such award to such claimant as he would be entitled to receive if such employer had complied with the provisions of section 1465-69, and such employer shall pay such award in the manner and amount fixed thereby or shall furnish to the industrial commission a bond, in such an amount and with such sureties as the

Ohio Commission. The Ohio law does not provide for review of an award by an appeal; but the employer is entitled to challenge, in an action for reimbursement, the correctness of the award in all respects save the amount of compensation.[2] Whether the full faith and credit clause is applicable to proceedings in this Court in the same manner and to the same extent as to proceedings in the courts of a State and in the lower federal courts, we have no occasion to consider; for we are of opinion that on the facts here presented the rule declared in the *Clapper* case is not applicable.

The following facts were agreed: The employer never had a regular place of business in Ohio; had not qualified to do business there as a foreign corporation; and had not complied with the provisions of the Ohio Workmen's Compensation Law, either by becoming a subscriber to the state insurance fund or by electing to pay compensation direct to injured employees or to their dependents in case of death. Both the company and Tidwell were residents of Tennessee; Tidwell had entered its employ there; it was a term of the employment that he should serve also in other States; and he had been brought to Ohio to erect there the tank which had been fabricated in Tennessee. Both the company and

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commission may require, to pay such employee such award in the manner and amount fixed thereby. In the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto, or to furnish such bond, within a period of ten days after notification of such award, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the commission, and the commission shall certify the same to the attorney general who shall forthwith institute a civil action against such employer in the name of the state, for the collection of such award." Ohio Gen. Code, sec. 1465-74.

[2]Fassig *v.* State, 95 Oh. St. 232, 242; Pittsburg Coal Co. *v.* Industrial Commission, 108 Oh. St. 185, 189-191; Slatmeyer *v.* Industrial Commission, 115 Oh. St. 654, 657, 661. The claimant, however, has a right of appeal, "if the commission finds that it has no jurisdiction of the claim and has no authority thereby to inquire into the extent of disability or the amount of compensation," and denies the claim for that reason, and if the claimant has sought a rehearing. Ohio General Code, sec. 1465-90; see 107 Ohio Laws, p. 162; State ex rel. Gilder *v.* Industrial Commission, 100 Oh. St. 500. Such an appeal is heard solely on the record made before the commission. See Grabler Mfg. Co. *v.* Wrobel, 125 Oh. St. 265.

The fact that the employer successfully defends the action by the State for reimbursement does not prejudice the right of the employee to receive payment of the amount theretofore awarded by the commission. State ex rel. Thompson *v.* Industrial Commission, 121 Oh. St. 17; State ex rel. Croy *v.* Industrial Commission, 123 Oh. St. 164, 173.

Tidwell had accepted the provisions of the Tennessee Workmen's Compensation Act, a law of the elective type; and under that law his widow would have been entitled to recover as compensation about $2200. After Tidwell's death, his widow, who had become a citizen and resident of Georgia, filed her application for compensation with the Industrial Commission of Ohio. The company, appearing specially, challenged the jurisdiction of the Commission. The objection was overruled; the company made no defense before that tribunal; and the Commission found that the company was an employer within the meaning of the Ohio law; that the injury was sustained accidentally in the course of the employment; and that the widow had not before filing the claim begun a court action against the employer on account of the death. Upon failure of the company to pay the award, it was paid from the state insurance fund.

In the *Clapper* case it was held that the Vermont Workmen's Compensation Act was a defense to an action brought in New Hampshire under the New Hampshire Act to recover for the death in that State of a Vermont resident who had been employed by a Vermont company, pursuant to a contract made in Vermont; because: "It clearly was the purpose of the Vermont Act[3] to preclude any recovery by proceedings brought in another State for injuries received in the course of a Vermont employment." 286 U. S. at 153.[4] The Tennessee Act is different. It is true that it provides that "when an accident happens while the employe is elsewhere than in this State, which would entitle him or his de-

[3]The provision is as follows: "*Right to Compensation Exclusive:* The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employees who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement." Vt. Gen. Laws, c. 241, § 5774.

[4]Had the question been merely the construction of the statute, no issue under the full faith and credit clause would have arisen. Banholzer *v.* New York Life Ins. Co., 178 U. S. 402; Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 495-496; Pennsylvania Fire Ins. Co. *v.* Gold Issue Mining Co., 243 U. S. 93, 96-97.

pendents to compensation had it happened in this State, the employe or his dependents shall be entitled to compensation under this act if the contract of employment was made in this State, unless otherwise expressly provided by said contract," Tenn. Code, sec. 6870; and that "the rights and remedies herein granted to an employe subject to this Act on account of personal injury or death by accident shall exclude other rights and remedies of such employe, his personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death." *Id.*, sec. 6859. But, as construed and applied by the highest court of Tennessee, the statute does not preclude recovery under the law of another State. And the full faith and credit clause does not require that greater effect be given the Tennessee statute elsewhere than is given in the courts of that State. Compare *Allen* v. *Alleghany Co.*, 196 U. S. 458, 465; *Robertson* v. *Pickrell*, 109 U. S. 608, 610-611; *Board of Public Works* v. *Columbia College*, 17 Wall. 521, 529.

The decision in *Tidwell* v. *Chattanooga Boiler & Tank Co.*, 163 Tenn. 420, 43 S. W. (2d) 948, shows that the provision of the Tennessee law making its remedy an exclusive one is not applicable on the facts here presented. In that case, Mrs. Tidwell brought (while the application in Ohio was pending and before the award) an action in Tennessee to recover compensation under the Tennessee Act. The court held that by bringing the Ohio proceedings the widow had renounced her right under the Tennessee Act; and final judgment was entered for the company shortly before the action at bar was begun. The opinion states that the suit is one upon contract; that "the sole defense interposed is the proceedings in Ohio"; that the institution of the proceedings in Ohio "was a clear renunciation or disaffirmance of the contract"; "that the election thus made was irrevocable, because the petitioner [Mrs. Tidwell] has taken the benefit of the Ohio suit and the defendant [the Company] will doubtless take the detriment of that suit"; and the court added: "Not prejudging another case, but merely by way of answer to argument made in this case, we may observe that defendant's way of escape from the Ohio proceedings and award is not apparent, after the pleading by the defendant of such proceeding and award to defeat its liability herein." In view of this decision, we have no occasion to consider differences in phraseology between the Tennessee statute and that of Vermont.

Judgment for the plaintiff.